No. 12,174

IN THE

United States Court of Appeals

For the Ninth Circuit

NAT YANISH, WILLIAM HEIKKILA, JOHN DIAZ, HERMAN LANSBURG and FRANK CARLSON,

Appellants,

vs.

I. F. WIXON, individually, and as District Director, Immigration and Naturalization Service, Department of Justice,

Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

The major issue in this case is clearly a legal question, not one of fact. Appellants urge by their appeal that all the provisions of the Administrative Procedure Act (5 U.S.C. 1001 et seq.) are applicable to deportation proceedings before the Immigration and Naturalization Service, and particularly that deportation hearings held by officers other than those designated under Section 11 (5 U.S.C. 1010) are null and void.

Appellee contends that the provisions of the Administrative Procedure Act, more particularly Sections 5, 7, 8, 10 and 11 (5 U.S.C. 1004, 1006, 1007, 1009 and 1010) are not applicable to deportation proceedings.

At all times since the filing of this complaint in the lower court the Immigration and Naturalization Service has been ready and willing to hold deportation hearings in each of the cases named in the action herein, under and in pursuance of what appellee considers to be the applicable Immigration and Naturalization laws and regulations.

None of the appellants in this case in their complaint alleges that at any time any one of them had been legally admitted to the United States. Warrants have been issued under authority of the Attorney General of the United States for the arrest of the appellants on the ground that they are now subject to deportation from the United States, and these warrants have been served upon each of the appellants by the appellee. Appellants are not now in custody but have been arrested and have been released on bond.

In the original complaint below I. F. Wixon was named as defendant, and in this appeal as appellee, as he was at the time District Director of the 13th Immigration District of the U. S. Immigration and Naturalization Service, which included the territory within the jurisdiction of the District Court and of this Court. He has, since May 1, 1949, been succeeded by Arthur J. Phelan, who is Acting District Director of said Immigration District. Appellee has always contended that I. F. Wixon, as District Director of the 13th Immigration District of the United States

Immigration and Naturalization Service, Department of Justice, was not a proper party to this action, and appellee insists, for the same reason, that Arthur J. Phelan, as Acting District Director, is not now a proper party, but has consented solely for the purpose of bringing the matter before the Court, that the name of Arthur J. Phelan, as Acting District Director be substituted in the place and stead of I. F. Wixon, District Director, who was named as defendant in the original action.

Each of the appellants was taken into custody by him under authority of a warrant from the Attorney General of the United States.

The deportation proceedings against the appellants commenced early in 1948, prior to May 7, 1948. The proceedings were conducted in the usual manner, prescribed by law and the regulations of the United States Immigration and Naturalization Service.

On October 6, 1948, the appellants sought to restrain the appellee from continuing deportation proceedings against the appellants, then in progress, on the grounds that each of them was entitled to a hearing under the provisions of 5 U.S.C. Sec. 1001, et seq. of the Administrative Procedure Act of June 11, 1946. At all times the appellee has been willing to accord the appellants hearings. After considering the arguments of counsel for both parties, and briefs submitted by them, the Court below, in a written opinion dated December 20, 1948, properly held that 5 U.S.C. Sec. 1006 has no application to proceedings for deportation of aliens under 8 U.S.C. Sec. 155. Thereafter the appellants sought appeal to this Court.

SUMMARY OF ARGUMENT.

1. At all times since May 7, 1948, the appellee has been willing and desirous of holding a hearing in connection with the deportation of each of the individual appellants under 8 U.S.C. 155.

2. That each and every one of the appellants, if and when taken into custody, has an adequate remedy in an application for a writ of habeas corpus.

3. That the Administrative Procedure Act of June 11, 1946 (5 U.S.C. 1001, et seq.) particularly Sec. 7 (5 U.S.C. 1006) has no application to hearings in deportation or exclusion proceedings under the immigration laws.

I. The Administrative Procedure Act did not create any additional right of judicial review in deportation cases.

II. The requirements of Sections 1004, 1006, 1007 and 1010 of the Administrative Procedure Act are not applicable to deportation proceedings.

(a) Deportation proceedings are not governed by Section 1004 of the Act.

(b) Deportation proceedings conducted by Immigration Inspectors are within the exception to Section 1006 of the Act.

4. That I. F. Wixon, individually and as District Director of the United States Immigration and Naturalization Service, Department of Justice, is not a proper defendant either individually or officially. It follows by corollary that Arthur J. Phelan, Acting Director of the United States Immigration and Nat-

uralization Service, Department of Justice, would also not be a proper defendant individually or officially.

5. That the complaint in this action states no cause of action as to I. F. Wixon, individually or officially, and since the name of Arthur J. Phelan has been substituted for that of I. F. Wixon, it states no cause of action as to Arthur J. Phelan, individually or officially.

6. That the appellants have not exhausted their legal administrative remedies.

ARGUMENT.

It is not believed that there is any substantial dispute between the parties as to the facts in this case. It appears that the issues in this case are solely issues of law.

AT ALL TIMES SINCE MAY 7, 1948, THE APPELLEE HAS BEEN WILLING AND DESIROUS OF HOLDING A HEARING IN CONNECTION WITH THE DEPORTATION OF EACH OF THE INDIVIDUAL APPELLANTS UNDER 8 U.S.C. 155.

Any delay in connection with the hearings since that date has been at the instance of each appellant.

2. THAT EACH AND EVERY ONE OF APPELLANTS IF AND WHEN TAKEN INTO CUSTODY HAS AN ADEQUATE REMEDY IN AN APPLICATION FOR A WRIT OF HABEAS CORPUS.

The Congress has an absolute and unqualified power to provide for the exclusion and deportation of any alien for any cause, and to prescribe the conditions under which an alien may enter or remain in the United States.[1] *It is a power inherent in sovereignty.*[2] *Moreover, it may commit the administration and enforcement of such laws to the executive officers of the Government,*[3] who may make rules not inconsistent with such laws to carry out the statutes and facilitate their enforcement.[4] Over no conceivable subject is the power of Congress more complete than that of regulating immigration.[5]

The deportation of aliens unlawfully in the United States is by statute committed to the Attorney Gen-

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[1]*Volpe v. Smith,* 289 U.S. 422 (1933); *Ng Fung Ho v. White,* 259 U.S. 276 (1922); *Bugajewitz v. Adams,* 228 U.S. 585, 591 (1913); *Zakonaite v. Wolf,* 226 U.S. 272 (1912); *Turner v. Williams,* 194 U.S. 279 (1904); *Fong Yue Ting v. United States,* 149 U.S. 698 (1893); *Nishimura Ekiu v. United States,* 142 U.S. 651 (1892); *The Chinese Exclusion Case,* 130 U.S. 581 (1889).

[2]*Fong Yue Ting v. United States,* 149 U.S. 698 (1893); *The Chinese Exclusion Case,* 130 U.S. 581 (1889); *Nishimura Ekiu v. United States,* 142 U.S. 651 (1892).

[3]*Low Wah Suey v. Backus,* 225 U.S. 460, 468 (1912); *United States v. Ju Toy,* 198 U.S. 253 (1905); *Turner v. Williams,* 194 U.S. 279 (1904); *The Japanese Immigrant Case,* 189 U.S. 86, 100 (1903); *Wong Wing v. United States,* 163 U.S. 228, 237 (1896); *Fong Yue Ting v. United States,* 149 U.S. 698, 707, 713 (1893).

[4]*Low Wah Suey v. Backus,* 225 U.S. 460 (1912); *Lum She You v. United States,* 82 F. (2d) 83 (C.C.A. 9, 1936); *Haff v. Tom Tang Shee,* 63 F. (2d) 191 (C.C.A. 9, 1933); *The Parthian,* 276 F. 903 (C.C.A. 2, 1921).

[5]*Oceanic Steam Navigation Company v. Stranahan,* 214 U.S. 320 (1909).

eral. Section 19 of the Immigration Act of 1917, as amended (39 Stat. 889-890; 54 Stat. 671-673; 56 Stat. 1044; 8 U.S.C. 155) provides that in deportation cases "the decision of the Attorney General shall be final." The statutes make no provision for judicial review and the finality of such administrative determinations has been repeatedly confirmed by the Courts since the earliest immigration cases.[6]

All attempts to secure direct judicial review or intervention in deportation cases have been flatly rejected by the Courts, regardless of the basis on which jurisdiction has been alleged. The Courts have held themselves without jurisdiction to entertain a bill in equity to cancel an order of deportation;[7] a bill in equity for injunctions;[8] a declaratory judgment;[9] a bill in equity for declaratory judgment;[10] a petition for writ or certiorari;[11] a petition for writ of prohibition;[12] a petition to compel return of evidence allegedly illegally procured.[13]

As recently as June 23, 1947, the Supreme Court of the United States cited the deportation case of *Bridges*

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[6]*Nishimura Ekiu v. United States,* 142 U.S. 631, 660 (1892); *Fong Yue Ting v. United States,* 149 U.S. 698 (1893).

[7]*Fafalois v. Doak,* 50 F. (2d) 640 (App. D.C., 1931), certiorari denied 264 U.S. 651.

[8]*Dash v. Zurbrick,* 6 F. Supp. 390 (S.D. Mich., 1934); *Bata Shoe Co. v. Perkins,* 33 F. Supp. 508 (D.C., D.C., 1940).

[9]*Bata Shoe Co. v. Perkins,* 33 F. Supp. 508 (D.C., D.C., 1940).

[10]*Darabi v. Northrup,* 54 F. (2d) 70 (C.C.A. 6, 1931).

[11]*In re Ban,* 21 F. (2d) 1009 (W.D., N.Y., 1927).

[12]*Poliszek v. Doak,* 57 F. (2d) 430 (App. D.C., 1932); *Kabadian v. Doak,* 65 F. (2d) 202 (App. D.C., 1933).

[13]*Impiriale v. Perkins,* 66 F. (2d) 805 (App. D.C., 1933), certiorari denied 290 U.S. 690.

v. Wixon, 326 U.S. 135 (1945) as an instance "where the order of the agency under which petitioner was detained was not subject to judicial review." (See *Sunal v. Large,* 67 Sup. Ct. 1588, 1590 footnote 3.)

The Courts, of course, have passed upon deportation cases in habeas corpus proceedings. Habeas corpus, however, does not provide a direct judicial review, such as is provided by appeal or writ of error. Habeas corpus is not a proceeding in the original suit, but is an independent civil suit.[14] It is a collateral review.[15] It stems, not from any right of judicial review, but from the due process clause of the Fifth Amendment to the Federal Constitution. Its purpose is to inquire into the cause of restraint of liberty,[16] and it is not available to one who, though anticipating arrest is not yet in custody.[17] It is not available as a matter of right, and the Court may refuse to issue the writ when it appears from the petition that the party is not entitled thereto.[18]

Moreover, the scope of the judicial review on habeas corpus is extremely narrow. The administrative findings of fact are conclusive, if supported by some evidence of probative value, and are not open to attack

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[14]*Biddle v. Dyche,* 262 U.S. 333 (1923).

[15]*Vajtauer v. Commissioner,* 273 U.S. 103 (1927).

[16](28 U.S.C. Chap. 153.)

[17]*Wales v. Whitney,* 114 U.S. 564 (1885); *Stallings v. Splain,* 253 U.S. 339 (1920); *Sibray v. United States,* 185 Fed. 401 (C.C.A. 3, 1911); *Ex parte Musci,* 1 F. Supp. 587 (S.D., N.Y., 1922); *Dess v. Lindsley,* 53 F. Supp. 427 (E.D. Ill., 1944).

[18](28 U.S.C. Chap. 153; *Walker v. Johnston,* 312 U.S. 275 (1941).)

merely by showing that they are wrong.[19] The Courts do review the administrative conclusions of law involving interpretation of the statutory grounds for deportation,[20] since the administrative authorities have no power to deport for a ground not listed in the statutes. Similarly, the Courts on habeas corpus will determine a petitioner's charge that the administrative hearing was unfair,[21] or that he has been in custody for an unreasonable length of time.[22]

The immigration statutes contemplate that the administrative determinations, when made within the scope of the statutory authority, shall be final. Where the immigration officials have exceeded or abused their authority, the writ or habeas corpus provides "an adequate and complete remedy."[23] Narrow in scope as it is, therefore, the review by habeas corpus is "the only available procedure to determine whether the immigration authorities have exceeded or abused their power."[24]

In the case of

Valenti v. Clark, 83 F. Supp. 167,

involving an action for declaratory judgment, that the plaintiff therein, who was a resident alien, was not subject to deportation, the Court stated:

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[19]*Vajtauer v. Commissioner,* 273 U.S. 103 (1927); *Tisi v. Tod,* 264 U.S. 109, 133 (1924).

[20]*Mahler v. Eby,* 264 U.S. 32 (1924); *Kessler v. Strecker,* 307 U.S. 22 (1939); *Bridges v. Wixon,* 326 U.S. 135 (1945).

[21]*Tod v. Waldman,* 266 U.S. 113 (1924).

[22]*Ross v. Wallis,* 279 Fed. 401 (C.C.A. 2, 1922).

[23]*Fafalios v. Doak,* 50 F. (2d) 640 (App. D.C., 1931), certiorari denied 264 U.S. 651.

[24]*Wong Sun v. Fluckey,* 288 Fed. 989, 994 (N.D., Ohio, 1922).

"Before reaching this question however, there is a very serious problem involved as to whether the plaintiff has pursued a remedy which may be granted him by this Court. Without doubt the plaintiff may secure a review of the action of the Commissioner of Immigration in the case that his deportation is ordered, by applying for a writ of habeas corpus in the district in which the plaintiff is held in custody. In this case that is the Southern District of New York.

"The court is of the opinion that an action for declaratory judgment is not suitable and does not lie in this district to review the action of the Attorney General in directing deportation."

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3. **THAT THE ADMINISTRATIVE PROCEDURE ACT OF JUNE 11, 1946 (5 U.S.C. 1001 et seq.) PARTICULARLY SEC. 7 (5 U.S.C. 1006) HAS NO APPLICATION TO HEARINGS IN DEPORTATION OR EXCLUSION PROCEEDINGS UNDER THE IMMIGRATION LAWS.**

I. **THE ADMINISTRATIVE PROCEDURE ACT DID NOT CREATE ANY ADDITIONAL RIGHT OF JUDICIAL REVIEW IN DEPORTATION CASES.**

Section 10 of the Administrative Procedure Act provides, *inter alia*:[25]

"Except so far as (1) *Statutes preclude judicial review* or (2) agency action is by law committed to agency discretion—

(a) RIGHT OF REVIEW—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action

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[25]The full text of Sec. 10 (5 U.S.C.A. 1009) appears in the appendix hereto.

within the meaning of any relevant statute, shall be entitled to judicial review thereof." (Italics supplied.)

The first question to be determined, then, is whether the deportation statute itself precludes judicial review.

The deportation statute precludes judicial review.

At the outset, it is clear that Congress did not intend to confer the right of review described in Section 10 indiscriminately upon any one aggrieved by any administrative agency action. Even assuming that Section 10 does create a new or additional right of judicial review, the opening sentence by its very terms withholds such right of review where the statute administered by the agency precludes judicial review.[26]

To preclude judicial review, it is not essential that the statute should state, in so many words, "Judicial review is precluded." Many statutes contain no ref-

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[26]See Senate Document No. 248, 79th Congress, 2d Session, which contains the legislative history of the Administrative Procedure Act. In discussing provisions of the measure in Congress, Senator McCarran, co-sponsor of the enacting legislation, made the following significant comment as reported at page 311, regarding the opening language of Section 10:

> Mr. McCarran. "Mr. President, let me say, in answer to the able Senator that the thought uppermost in presenting this bill is that where an agency without authority or by caprice makes a decision, then it is subject to review.
>
> "But in answer to the first part of the Senator's question—namely, where a review is precluded by law—we do not interfere with the status, anywhere in this bill. Substantive law, law enacted by statute by the Congress of the United States, granting a review or denying a review is not interfered with by this bill. *We are not setting ourselves up to abrogate acts of Congress.*" (Italics added.)

erence, express or implied, to judicial review. While it is not to be lightly assumed that the silence of the statutes bars from the Courts an otherwise justiciable issue,[27] such statute may indicate on its face a purpose to limit or even preclude review.

Thus, in *American Federation of Labor v. National Labor Relations Board*[28] it was held that a certification by the Board of a bargaining representative under Section 9(c) of the Wagner Act is not reviewable by the Courts under Section 10(f) of the Act, the latter providing only for judicial review of a "final order." The Court stated:

> "The statute on its face thus indicates a purpose to limit review afforded by Section 10 to orders of the Board prohibiting unfair labor practices, a purpose and construction which its legislative history confirms."

Similarly, in *Switchman's Union of North America v. National Mediation Board*,[29] the Court held that there was no right of judicial review of the Board's certification of bargaining representatives under Section 2(9) of the Railway Labor Act. The statute does not expressly provide that such certification is conclusive, but the Court construed the failure of the statute to provide for judicial review, in the light of the general pattern of the Act, as evincing a Congressional intent to make the administrative action final. The Court went on to state (at p. 303):

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[27]*Stark v. Wickard*, 321 U.S. 288, 309 (1944).
[28]308 U.S. 401 (1940).
[29]330 U.S. 297 (1943).

"The fact that the certificate of the Mediation Board is conclusive is of course of no ground for judicial review. *Great Northern Ry. Co. v. United States,* 277 U.S. 172, 182, 48 S. Ct. 466, 467, 72 L. Ed. 836. Congress has long delegated to executive officers or executive agencies the determination of complicated questions of fact and of law. And where no judicial review was provided by Congress this court has often refused to furnish one even where questions of law might be involved. *See State of Louisiana v. McAdoo,* 234 U.S. 627, 633, 34 S. Ct. 938, 490, 58 L. Ed. 1506; *United States v. George S. Bush & Co.,* 310 U.S. 371, 60 S. Ct. 944, 84 L. Ed. 1259; *Work v. U. S. ex rel. Rivee,* 267 U.S. 175, 45 S. Ct. 252, 69 L. Ed. 561; *United States v. Babcock,* supra. We need not determine the full reach of that rule. See *Bates & Guild Co. v. Payne,* 194 U.S. 106, 24 S. Ct. 595, 48 L. Ed. 894; *Houston v. St. Louis Independent Packing Co.,* 249 U.S. 479, 39 S. Ct. 332, 63 L. Ed. 717. But its application here is most appropriate by reason of the pattern of this Act."

In the case of *Trinler v. Carusi,*[30] Judge McGranery also referred to the case of *Estop v. United States,*[31] as meriting consideration.

He said:

"The Supreme Court there construed section 11 of the Selective Training and Service Act of 1940, 50 U.S.C.A. 311, to allow a defendant, indicted for a violation of the Act to attack a local board's

[30]72 Fed. Supp. 193; reversed 166 F. (2d) 457 and later abated 168 F. (2d) 1014. (Full discussion on p. 23 hereof.)

[31]327 U.S. 144.

induction order, even though section 10(a)(2) of that Act states that the 'decisions of such local boards shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe.' It construed the words 'shall be final' to limit the scope, rather than the right, of review of local board action taken under the Act. *Estop v. United States,* supra, at 122. However, the Court feels that this decision is not controlling here. The proceedings of which Estop successfully sought review by means other than habeas corpus was a criminal one, and this was, in large part, the basis of the decision. *Estop v. United States,* supra, at 122. The deportation proceeding of which petitioner in the instant case seeks review is civil in nature. *Bikolumsky v. Tod,* 263 U.S. 149. Moreover, the concrete issue in the instant case is what Congress intended thirty years ago on the question of review of deportation orders and whether the Administrative Procedure Act effects a change. Its original intent has been made clear by an unbroken line of decisions denying the sort of review prayed for in the instant case, and, significant to the inquiry into Congressional intent in the Administrative Procedure Act is the statement of the Attorney General found in Senate Document No. 248, supra, at p. 415 * * *"[32]

Also for purpose of comparative analogy between the provisions of Section 19 of the Immigration Act of 1917 (8 U.S.C. 155) stating that the decision of the Attorney General shall be final, and the summary

[32]The Attorney General's statement referred to in the opinion is set forth at pages 20-21 of this brief.

power granted under the Alien Enemy Act of 1798, which empowers the President, whenever there is a "declared war" between the United States and any foreign country, to provide for the removal of alien enemies from the United States, it is significant to observe that in the case of *Ludecke v. Watkins,* 335 U. S. 160, the Supreme Court said, with reference to the Alien Enemy Act there solely involved:

> "As Congress explicitly recognized in the recent Administrative Procedure Act, some statutes 'preclude judicial review.' Act of June 11, 1946, Sec. 10, 60 Stat. 237, 243. Barring questions of interpretation and constitutionality, the Alien Enemy Act of 1798 is such a statute. Its terms, purpose, and construction leave no doubt. The language employed by the Fifth Congress could hardly be made clearer, or be rendered doubtful, by the incomplete and not always dependable accounts we have of debates in the early Congress. (Footnote omitted.) That such was the scope of the Act is established by controlling contemporaneous construction * * * We would so read the Act if it came before us without the impressive gloss of history."

Finally, the term "statute," as used in the Administrative Procedure Act, in its different portions, may mean either a specific provision of statute or one embodied by judicial construction. Thus in Section 10(b) of the Act, the term "by *law*" was substituted for the words "by *statute*" as contained in the bill originally introduced, in order to insure that the statutory procedure would be excluisve not only where the statutes expressly so required in terms but where it was so

construed as well (Senate Document No. 248, 79th Cong., 2d Sess. pp. 36-37, 212-213, 276.) On the other hand, the term "statute," as used in the introductory clause of Section 10 excluding judicial review where "statute" precludes such review, includes not only cases where judicial review is expressly precluded but those in which the statute is so construed as well, as is clear from the deliberate omission of the word "expressly" from the bill as enacted (Sen. Doc. 248, supra, p. 160—The citation is to Section 10 of H.R. 1203, as originally introduced, the text of which was identical with S. 7 (Sen. Doc. 248, supra, p. 11) which in terms excepted from the judicial review provisions, cases in which the "statutes expressly precluded" such review).

Upon the whole of the foregoing there is sound basis for concluding that the immigration statute precludes judicial review, as that term is properly understood. The conclusiveness of the administrative determination is not dependent on inference and it does not require a sweeping analysis of the entire statutory pattern to ascertain the legislative intent in this regard. The Congressional intent to forbid judicial review is expressed in terms which are specific, clear and unmistakable: "The decision of the Attorney General shall be final" (Section 19, Immigration Act of 1917, 8 U.S.C. 155). In the face of so explicit an expression, it may seem superflous to point to the unanimity with which the Courts have thus far denied judicial review in deportation proceedings.

Section 10 of the Administrative Procedure Act is a restatement of existing law.

Even if the immigration statute did not preclude judicial review, an analysis of Section 10 indicates that, far from creating a new or amplifying an existing right or form of review, it merely restates in statutory language the present doctrines of judicial review.

Subsection (a) of Sec. 10.

Section 10 in substance, states who is entitled to judicial review, prescribes the form of review proceedings, defines what actions are reviewable, states the interim relief available and defines the scope of review. Subsection (a), which defines the right of review, does not purport to create any new right of review. In commenting on this subsection in the bill (S.7) which later was enacted as the Administrative Procedure Act, the Attorney General stated, "This reflects existing law." (Senate Document No. 248, 79th Congress 2d Session, p. 230.) Under existing law, a person suffering legal wrong in deportation proceedings (that is, one who is unlawfully detained by the immigration authorities) is entitled to relief only by way of habeas corpus. A person to whom subsection (a) is applicable is entitled to judicial review in the form prescribed by subsection (b). Thus, assuming that deportation proceedings are not within the exception to Section 10, and assuming that a person ordered deported is entitled to judicial review under subsection (a), we must turn to subsection (b) to determine the applicable form of proceeding for judicial review.

Subsection (b) of Sec. 10.

Analysis of subsection (b) reveals that it, too, is a restatement of existing law and does not purport to create any new form or vehicle of judicial review. As pointed out in the Senate Judiciary Committee Print (Senate Document No. 248, supra, pp. 36-37) with respect to subsection (b):

> "The first sentence states the general situation, that methods of review are 'of two kinds: (a) those contained in statutes and (b) those developed by the courts in the absence of legislation * * * The non-statutory remedies * * * are available * * * where the remedy provided by statute is not an adequate substitute or does not include the particular situation involved.' "

In commenting on this subsection, the Attorney General stated (Senate Document No. 248, supra, p. 230):

> "Section 10(b): This subsection requires that where a specific statutory method is provided for reviewing a given type of case in the courts, that procedure shall be used. If there is no such procedure, or if the procedure is inadequate (i.e., where under existing law a court would regard the special statutory procedure as inadequate and would grant another form of relief), then any applicable procedure, such as prohibitory or mandatory injunction, declaratory judgment, or habeas corpus is available."

In short, where the statute administered by the agency prescribes a form of judicial review, that is the form to be employed. If the statute fails to provide the form of review, or the statutory form is inadequate, then any person entitled to judicial review

is relegated to the *applicable* form of review heretofore developed by the Courts, whether it be a common law writ or other traditional method of review. Subsection (b), by its terms, does not purport to create any new form of review, such as a "Petition for Review". Where there is an applicable and adequate form of review, whether statutory or traditional, that is the form to be used.

The deportation statute, as heretofore pointed out, contains no provisions for judicial review. Habeas corpus is the applicable and exclusive form of review in deportation cases.[33] The fact that detention is a prerequisite to the issuance of the writ does not render it the less adequate; the fact that the alien prefers a judicial determination without surrendering himself into custody does not warrant the Courts to create a new or employ another form of review.[34]

The scope of subsection (b) was clearly expressed by Congressman Francis E. Walter, Chairman of the Sub-committee of the Committee on the Judiciary which sponsored this legislation, on the floor of the House on May 24, 1946, shortly before the bill's enactment (Senate Document No. 248, supra, p. 369):

> "The provisions summarize the situation as it is now generally understood. The section does not disturb special proceedings which Congress has provided, nor does it disturb the venue arrange-

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[33] *Kabadian v. Doak*, 65 F. (2d) 202 (App. D.C., 1933), certiorari denied 290 U.S. 661; *In re Ban*, 21 F. (2d) 1009 (W.D., N.Y., 1927); *Wong Sun v. Fluckey*, 288 Fed. 989, 994 (N.D., Ohio, 1922).

[34] *Fafalios v. Doak*, 50 F. (2d) 640 (App. D.C., 1931), certiorari denied 264 U.S. 651.

ments under existing law. *It does, however, constitute a statutory adoption of traditional forms of action in cases where Congress had made no contrary provision for judicial review.*" (Italics supplied.)

Applied to deportation cases, this means simply that habeas corpus, which heretofore has been recognized only by the courts as the traditional form of review, now has Congressional sanction as the appropriate remedy.

Subsection (c) of Sec. 10.

Subsection (c) sets forth what actions of administrative agencies are reviewable by the Courts, and states that "every final agency action for which there is no other adequate remedy in any Court shall be subject to judicial review." This language must be read in conjunction with the other parts of Section 10. When so read, it is clear that this subsection defines and restricts the types of action subject to review, rather than creating any new right of review. The types of agency action so reviewable, of course, are reviewable in the manner prescribed by the subsection (b).

* * *

Summing up Section 10 in its entirety, we can think of no more appropriate comment than the statement of the Attorney General, placed in the Congressional Record on May 25, 1946, by Congressman Sam Hobbs (Senate Document No. 248, supra, p. 415):

"Section 10 as to judicial review does not, in my view, make any real changes in existing law. This section in general declares the existing law con-

cerning judicial review. It is an attempt to restate in exact statutory language the doctrine of judicial review as expounded in various statutes and as interpreted by the Supreme Court. I know that some agencies are quite concerned about the phraseology used in section 10 for fear that it will change the existing doctrine of judicial review which has been settled for the particular agency concerned. I feel sure that should this section be given the interpretation which is intended, namely, that it is merely a restatement of existing law, there should be no difficulty for any agency. We may in a sense look at section 10 as an attempt by Congress to place into statutory language existing methods of review."

Court decisions.

This view of the Attorney General was sustained by the United States District Court for the District of Massachusetts in *Olin Industries, Inc. v. National Labor Relations Board.*[35] There an injunction was sought against the N.L.R.B. and jurisdiction was alleged under Section 10 of the Administrative Procedure Act. In dismissing the complaint, the Court stated (at p. 228):

"Both the terms of this section and its legislative history, make it clear that Section 10 is merely declaratory of the existing law of judicial review and that it neither confers jurisdiction on this court above and beyond that which it already has, nor grants to aggrieved parties any rights they did not have under the National Labor Relations Act."

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[35]72 F. Supp. 225 (1947).

In *Hearst Radio, Inc. v. Federal Communications Commission,* United States District Court, District of Columbia, July 3, 1947,[36] the Court, in granting the Government's motion to dismiss the complaint for review of an order instituting a hearing, said that:

> "* * * Here section 402(b) of the Communications Act affords the means of judicial review. *I do not think the Administrative Procedure Act is intended to enlarge the methods or scope of such review, and in my opinion it would be stretching the Declaratory Judgment Act out of all reason to resort to its use as a means of meddling in the proceedings now pending before the Commission* * * *" (Emphasis supplied.)

The Administrative Procedure Act was referred to in an immigration case, *U. S. ex rel. Von Kleczowski v. Watkins,*[37] wherein the Court stated (at p. 438):

> "Suffice it to say that Congress has not entrusted to the courts, in the immigration laws, the power to weigh the merit or demerit of those who knock at our doors for admission, or of those who are found, by fair administrative proceedings, to be deportable. The solitary exception (8 U.S.C.A. 155 (a)) only confirms the generality of the rule. *The* power so specifically withheld was not conferred by the *general language of the Administrative Procedure Act,* Public Law 404, 79th Congress, Section 10(c) 5 U.S.C.A. 1009 (c)." (Italics supplied.)

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[36]73 F. Supp. 308 (D.C., D.C., 1947), affirmed 167 F. (2d) 225 (App. D.C., 1948).

[37]71 F. Supp. 428 (S.D., N.Y., 1947).

In one of the first cases solely involving the applicability of Section 10 of the Administrative Procedure Act to review deportation determinations[38] the District Court in dismissing plaintiff's petition for review under that section stated that:

> "Against the background of the deportation process, the source of the power and its political and international connotations, the petitioner's statuts as a visitor on this nation's terms, the unanimous refusal of the courts to allow direct review of deportation orders in the past, and the possible ill effects inherent in a contrary course upon efficient handling of the immigration laws and judcial administration of crowded dockets, the court feels that to impute Congressional intent to allow the petition in the instant case would be an uncalled for interference with the administrative process. Since 8 U.S.C. 155 limits judicial review of deportation orders, Section 10 of the Administrative Procedure Act is, by its terms, inapplicable. Accordingly petitioner's bill of review is dismissed."

In reversing the District Court on February 16, 1948, the Third Circuit Court of Appeal took the view that under the Administrative Procedure Act plaintiff Trinler was entitled to have judicial review as one adversely affected by a deportation order after its promulgation but before he had been taken

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[38]*Trinler v. Carusi,* 72 Fed. Supp. 193, reversed in *Trinler v. Carusi,* Third Circuit, February 16, 1948, 166 F. (2d) 457, and later abated by decision of the same Circuit on July 8, 1948, 168 F. (2d) 1014, which vacated its judgment of February 16, 1948, and the judgment of the Court below, and remanded the cause to the District Court with order to dismiss the cause as abated.

into custody. But Circuit Judge O'Connell dissented, stating (p. 462) that:

> "In the absence of Congressional history indicating an intent to broaden the scope of judicial review so as to include proceedings inherently political such as those here involved, *Fong Yue Ting v. United States,* 1893, 149 U.S. 698, 13 S. Ct. 1016, 37 L. Ed. 905, I am of the opinion that the finality clause of the Immigration Act of 1917 is within the excepting clause with which Section 10 of the Administrative Procedure Act opens. As recently as February 9, 1948, the Supreme Court has said: 'This Court long has held that statutes which employ broad terms to confer power of judicial review are not always to be read literally. Where Congress has authorized review of "any order" or used other equally inclusive terms, courts have declined the opportunity to magnify their jurisdiction, by self-denying constructions which do not subject to judicial control orders which, from their nature, from the context of the Act, or from the relation of judicial power to the subject-matter, are inappropriate for review.' *Chicago and Southern Air Lines, Inc. v. Waterman S. S. Corp.,* 1948, 68 S. Ct. 431, 433. I believe that the instant case calls for application of that principle. (Cf. *International Union v. Bradley,* D.C. 75 F. Supp. 394.)
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> "In *Sunal v. Large,* 1947, 332 U.S. 174, at 177, 67 S. Ct. 1588, at 1590, footnote 3, the Supreme Court recently said, 'We therefore lay to one side cases such as *Bridges v. Wixon,* 326 U.S. 135, 65 S. Ct. 1443, 89 L. Ed. 2193; * * * where the order of the agency under which petitioner was detained was not subject to judicial review.' (Cases deny-

ing forms of relief other than habeas corpus include: *In re Ban,* W.D., N.Y., 1927, 21 F. (2d) 1009, petition for writ of certiorari; *Fafalios v. Doak,* 60 App. D.C. 215, 50 F. (2d) 640; bill in equity to cancel deportation order, certiorari denied 1931, 284 U.S. 651, 52 S. Ct. 31, 76 L. Ed. 552; *Darabi v. Northrup,* 6 Cir., 1931, 54 F. (2d) 70; bill in equity for declaratory judgment; *Poliszek v. Doak,* 1932, 61 App. D.C. 64, 57 F. (2d) 430; petition for writ of prohibition; *Kabadian v. Doak,* 1933, 62 App. D.C. 114, 65 F. (2d) 202; petition for writ of prohibition, certiorari denied 290 U.S. 661, 54 S. Ct. 76, 78 L. Ed. 572; *Impiriale v. Perkins,* 1933, 62 App. D.C. 279, 66 F. (2d) 805; petition to compel return of evidence, certiorari denied 290 U.S. 690, 54 S. Ct. 126, 78 L. Ed. 594; *Rish v. Zurbrick,* E.D., Mich., 1934, 6 F. Supp. 390; bill in equity for injunction, affirmed on another ground, 6 Cir., 1935, 75 F. (2d) 934; and *Bata Shoe Co. v. Perkins,* D.C., D.C. 1940, 33 F. Supp. 508; bill in equity for injunction. See also *Lai To Hong v. Ebey,* 7 Cir., 1928, 25 F. (2d) 714, 716; *Daskaloff v. Zurbrick,* 6 Cir., 1939, 103 F. (2d) 579, 581; and *Kessler v. Strecker,* 1939, 307 U.S. 22, 34, 59 S.C. 394, 83 L. Ed. 1982.) From the foregoing, it seems reasonable to me to infer that habeas corpus proceedings heretofore have not been considered 'judicial review.' This analysis is strengthened by *Ex parte Tom Tong,* 1883, 108 U.S. 556, 559, 560, 2 S. Ct. 871, 872, 27 L. Ed. 826, in which it was stated that 'The prosecution against him (petitioner for a writ of habeas corpus) is a criminal prosecution, but the writ of habeas corpus which he has obtained is not a proceeding in that prosecution. On the contrary, it is a new

suit brought by him to enforce a civil right, which he claims * * *.' Consequently, I am impelled to the conclusion that the statutory mandate according finality to the decisions of the Attorney General remains unimpaired.

"Moreover, since judicial review under the Administrative Procedure Act permits at least an inquiry into whether the decision is supported by 'substantial evidence,' I find some difficulty in reconciling such inquiry with the finality mandate of Section 19 of the Immigration Act of 1917.

"Accordingly, I think the judgment of the lower court should be affirmed."

Had the Circuit Court's decision of February 16, 1948, not been later vacated by the same Court, and the cause abated, thus in effect eliminating the *Trinler* case from the docket as a precedent, it would, of course, support the view that Section 10 of the Administrative Procedure Act is applicable as a basis for review of deportation orders. The majority and dissenting opinions in that case, of course, have been studied in relation to other Court cases arising from deportation proceedings, as in the case of *Lee Tack v. Clark, et al.*[39] In that case Judge Clancy, on June 30, 1948, in denying plaintiff's motion for an injunction and granting defendant's motion to dismiss the complaint, said, in the part here pertinent:

"The Plaintiff assumes to proceed under the Administrative Procedure Act, 5 U.S.C.A. 1001, et seq. Despite the split decision in *Trinler v. Carusi,*

[39]U.S. District Court, Southern District, New York, Civ. 46-279.

166 Fed. (2d) 157, we still do not believe that that statute applied to deportation proceedings. *The reasons given in the dissenting opinion are sufficient to support our judgment.*" (Italics added.)

However, Judge Clancy's opinion in the foregoing case was contra to that of Judge Ryan of the same District, in the case of *Cammarata v. Miller,* decided earlier on April 20, 1948,[40] which concluded that the Administrative Procedure Act created a new remedy described as a bill of review, to question determinations in deportation proceedings. The *Cammarata* case did not form the basis for appeal because administrative action precluded the necessity of a formal order from which appeal could be taken.

In the cases of *Azzollini v. Watkins* and *Abbatista v. Watkins,* in the United States District Court for the Southern District of New York, 81 F. Supp. 127, the Court stated:

> "Petitioners ask that proceedings instituted for their deportation, and which have resulted in orders for deportation, be reviewed by this Court under Section 10 of the Administrative Procedure Act (5 U.S.C. 1009) and that pending such review proceedings be stayed. In my opinion the Administrative Procedure Act has no application * * *."

When the *Azzollini* cases were brought to the attention of the U. S. Court of Appeals for the 2nd Circuit (172 F. (2d) 897), Frank, Circuit Judge, in his opinion, stated:

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[40]U.S. District Court, Southern District, New York, Civ. 45-287.

> "Until the enactment of the Administrative Procedure Act of 1946, it was clear that habeas corpus was the only procedure by which deportation proceedings could be reviewed. *Imperiale v. Perkins,* 66 F. (2d) 805 (App. D.C.); *Kabadian v. Doak,* 65 F. (2d) 202 (App. D.C.); *Sibray v. United States,* 158 F. 401 (C.C.A.-3rd). Petitioner contends that Sec. 10 of the Administrative Procedure Act, 5 U.S.C. Sec. 1009, authorizes review by means of this petition to review, even though he is not now in custody. The Court of Appeals for the 3rd Circuit so held in *Trinler v. Carusi,* 166 F. (2d) 457. But we need not decide this question, for, even if this form of review is permissible, the petition is without merit."

The claim that the Administrative Procedure Act applied to immigration proceedings was urged in the District Court of the United States for the Northern District of California in the case of *Wong So Wan and Wong Tuey Wan* on Habeas Corpus, No. 28214-G, 82 F. Supp. 60, before Judge Goodman in this District. On October 29, 1948, Judge Goodman stated:

> "It is claimed that the Administrative Procedure Act of June 11, 1946 (5 U.S.C. 1001 et seq.) applied to Immigration Procedures. I am convinced that it does not (5 U.S.C. 1006 (2); *U. S. v. Watkins,* 73 Fed. Supp. 216; *Obum v. Watkins,* S.D., N.Y., decided June 6, 1948, not yet reported; *Wong Yang Sung v. Clark,* D.C., D.C., decided July 28, 1948, not yet reported). Certainly it does not apply to preliminary examinations. (8 U.S.C. 152; *Ngim Ah Oy v. Haff,* 9 Cir. 112 Fed. (2d) 607."

Appellee does not agree with the Circuit Court's first holding in the *Trinler* case, now abated, nor with the decision in the *Cammarata* case, and believes that the dissent in the *Trinler* case and the decision of Judge Clancey in the *Lee Tack* case present the proper legal view. This belief is supported by the later decisions of Judge Coxe and Judge Goodman cited above. Also, as was stated in *United States ex rel. Von Kleczkowski v. Watkins,*[41] Congress not having previously entrusted to the Courts in the immigration law, the power to weigh the merit or demerit of those who knock at our doors for admission, or of those who are found by fair administrative proceedings to be deportable, it is believed that the power so specifically withheld was not conferred by the general language of the Administrative Procedure Act.

Upon the foregoing it is believed that the express language of 8 U.S.C. 155(a) that in deportation cases "the decision of the Attorney General shall be final" and that aliens of prescribed classes "shall, upon the warrant of the Attorney General be taken into custody and deported" remains the explicit and emphatic directive of Congress, and in the absence of express language in the Administrative Procedure Act modifying that authority, any limitation thereof by judicial interpretation of 5 U.S.C. 1009, a statute of general application, would seem to make that section operate as an implied repealer of the express provisions of 8 U.S.C. 155 (a). And repeal by implication may not

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[41]71 F. Supp. 429 (S.D., N.Y., 1947).

be inferred in the absence of compelling evidence that Congress so intended.[42]

Finally, there is nothing in the Administrative Procedure Act nor the legislative history thereof that would indicate a definite intention of Congress to repeal the express provisions of 8 U.S.C. 155(a) or provide any new judicial review remedy for deportation proceedings, and to the contrary the background of that Act indicates that Congress was thinking of legislation directed generally toward administrative actions in these agencies of Government concerned with determining rights of parties other than aliens whose admission to the United States, or exclusion or expulsion therefrom, involve an exercise of sovereignty and are inherently international and political in nature.

In this connection the Court's attention is called to the references to the "foreign affairs functions" of the Federal Government contained in Section 4 of the Act (5 U.S.C.A. 1003) as follows:

> "* * * except * * * naval or foreign affairs functions of the United States * * *"

and Section 5 (5 U.S.C.A. 1004 as follows:

> "* * * except * * * 'foreign affairs functions' * * *"

As was the view of the Attorney General in his statement regarding 5 U.S.C. 1009 (set forth at pages

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[42] *U.S. Alkali Ass'n v. United States*, 325 U.S. 196, 209; *United States v. Borden Corp.*, 308 U.S. 188, 198; *United States v. Jackson*, 302 U.S. 628, 631; *General Motors Corp. v. United States*, 286 U.S. 49, 61-62.

20-21 hereof) that section does not make any real change in existing law, but in general declares the existing law concerning judicial review; it is an attempt by Congress to place into statutory language existing methods of review; and in the absence of any special statutory review proceedings, other forms of action, as heretofore found by the Courts to be appropriate in particular situations, will be used. Thus, habeas corpus proceedings should be used to obtain review of exclusion and deportation orders.[43]

II. THE REQUIREMENTS OF SECTIONS 1004, 1006, 1007 AND 1010 OF THE ADMINISTRATIVE PROCEDURE ACT ARE NOT APPLICABLE TO DEPORTATION PROCEEDINGS.

Summary.

(a) Deportation proceedings involve "adjudication" within the meaning of Section 2(d) of the Administrative Procedure Act (5 U.S.C. 1001 (d)).

Sections 7 and 8 of that Act (5 U.S.C. 1006-7) by their terms apply only to cases of "adjudication" which are governed by Section 5 (5 U.S.C. 1004).

And Section 5 applies only to cases

> *required by statute* to be determined on the record after opportunity for an agency hearing, etc. (Italics added.)

The legislative history of the Administrative Procedure Act makes clear that the word "statute" was

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[43] *Vajtauer v. Commissioner of Immigration*, 273 U.S. 103 (1927). (See Attorney General's Manual on the Administrative Procedure Act, p. 97.)

used deliberately so as to make Section 5 (and accordingly Sections 7 and 8) applicable only where Congress by some other statute has specifically required a hearing to be held.[44]

In cases where a hearing is held, although not required by statute, but as a matter of due process or agency policy or practice, Sections 5, 7, and 8 do not apply.[45] Inasmuch as 8 U.S.C. 155 does not require agency hearings, proceedings under that statute are not subject to Sections 5, 7, and 8 of the Administrative Procedure Act.

Section 11 of the Administrative Procedure Act (5 U.S.C. 1010) provides for appointment of qualified and competent examiners as may be necessary *for proceedings pursuant to Sections 7 and 8* of the same Act; hence Sections 7 and 8 are not applicable to deportation proceedings, Section 11 is likewise not applicable.

(b) Assuming, without conceding, that Sections 5, 7, 8 and 11 of the Administrative Procedure Act are applicable, then deportation proceedings conducted by immigration inspectors are within the exception to Section 7(a) of the Administrative Procedure Act (5 U.S.C. 1006) which reads:

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[44]Senate Hearings on Administrative Procedure before the Senate Judiciary Committee, 77th Cong., 1st Sess. (1941), pp. 453, 577; Senate Comparative Committee Print of June 1945, p. 7 (Sen. Doc. No. 248, p. 22); House Hearings (1945), p. 33 (Sen. Doc. No. 248, p. 79; Sen. Rep. No. 752, p. 40; Sen Doc. 248, p. 226); Cong. Rec., May 24, 1946, p. 5756 (Sen. Doc. No. 248, p. 359).

[45]Senate Hearings ibid., p. 1456.

"* * * nothing in this Act shall be deemed to supersede the conduct of special classes of proceedings in whole or in part by or before boards of other officers specially provided for by or designated pursuant to statute."

* * * * * * *

(a) Deportation proceedings are not governed by Section 5 of the Act.

Argument.

At the outset, it should be observed that the hearing examiners referred to in Section 11 of the Act are not required in *all* agency hearings, but only in "proceedings pursuant to Sections 7 and 8." Sections 7 and 8, by their terms, govern only hearings required by Sections 4 or 5 of the Act. Section 4 concerns rule making, which is not here involved.

It should be noted, however, that Section 4(1) (5 U.S.C. 1003) excepts from the provisions of that section

"* * * in foreign affairs functions of the United States * * *."

It is noted that this provision excepting "foreign affairs" also appears in Section 5, Sub-section 4, (5 U.S.C. 1004) excepting from the provisions of that section proceedings involving

"the conduct of * * * foreign affairs functions".

Section 5 applies to adjudications, and a deportation proceeding involves adjudication within the meaning of Section 2(d) of the Act.

However, Section 5 does not require a hearing pursuant to Sections 7 and 8 in *every* case of adjudication, but rather,

> "In every case of adjudication *required by statute* to be determined on the record after opportunity for an agency hearing * * *" (Emphasis supplied.)

An analysis of the legislative history of the Act reveals that Section 5 (and consequently Sections 7, 8 and 11) apply only where the substantive statute governing the agency action specifically requires a hearing.

The hearing accorded an alien in a deportation proceeding is *not* required by the substantive immigration statute. The statute (8 U.S.C. 155, 156) after defining the deportation classes of aliens, provides that upon the warrant of the Attorney General, aliens within those classes "shall be taken into custody and deported." The immigration statute nowhere requires the Attorney General's adjudication "to be determined on the record after opportunity for an agency hearing."

While a hearing of some character is necessary to the validity of a deportation order, this requirement is one which has been evolved by judicial decision, applying customary concepts of due process.[46] Thus, the hearing accorded an alien in a deportation case is

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[46] *Vajtauer v. Commissioner,* 273 U.S. 103, 106; *The Japanese Immigrant Case,* 189 U.S. 65, 100-101; *Fong Yue Ting v. United States,* 149 U.S. 698.

one "required by law" rather than one "required by statute."[47]

That the distinction between hearings required by law and hearings required by statute is significant, is manifested by the legislative history of the Administrative Procedure Act. For many years prior to its enactment, the whole field of administrative procedure had been analyzed and explored by numerous authorities. The Act derives largely from two bills introduced in the 77th Cong., 1st Sess. (1941), S. 674 and S. 675, which embodied the views of the minority and majority members, respectively, of the Attorney General's Committee on Administrative Procedure. Section 301 of both bills provided that its formal procedural provisions should apply to cases where opportunity for hearing was "required by *law.*" (Emphasis supplied.) In 1941, extensive hearings were held on S. 674 and other bills by a Senate Judiciary Subcommittee. During these hearings it was suggested that the phrase "required by law" was ambiguous in its reach, and that there be substituted the term "statute or *constitution.*" Thus, Interstate Commerce Commissioner Aitchison stated (Senate Hearings on S. 674, etc. 77th Cong., 1st Sess. (1941) (453-454):

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[47]See *Ludecke v. Watkins,* District Director of Immigration, 335 U.S. 160, involving the Alien Enemy Act, wherein the Supreme Court pointed out that the fact that hearings are utilized by the Executive to secure an informed basis for the exercise of the summary power conferred by the Act does not empower the Courts to retry such hearings, nor does it make the withholding of such power from the Courts a denial of due process. (pp. 171-172.)

> * * * Further, the bill speaks of a hearing "required by law." *Does this, in a case where the statute is silent, require the agency to determine whether the Constitution implies a right to be heard?* (Emphasis supplied.)

More specifically, the Commissioner of Immigration (Schofield, Special Assistant to the Attorney General in charge of the Immigration and Naturalization Service) testified (*ibid.*, p. 577):

> Now, when we come to section 301. We think there ought to be some clarification of the first part of that section. As it now reads it provides that the section—that the act—the section of this title, as a matter of fact, "shall be applicable to proceedings wherein rights, duties or other legal regulations are required by law to be determined after opportunity for hearing."
>
> We think that that ought to be made more specific and that it ought to read something like this: That they shall apply "only to proceedings wherein rights, duties or other legal relations are required by the *constitution or statutes* to be determined after opportunity for formal hearing, and if such a hearing be held, only upon the basis of a record made in the course of such hearing."
>
> In other words, so that it would be clear that this statute would apply only to those matters of administrative function in our service, which are disposed of by formal hearing. This would mean exclusion cases and deportation cases (emphasis supplied).

Similarly, Solicitor General Biddle suggested that "statute *or* constitution" be substituted for "law". He pointed out (*ibid,* p. 1456) that:

> In some cases certain agencies have ex gratia by regulations imposed upon themselves requirements of formal procedures though the applicable statute makes no such requirement. In order to exclude the possibility that such procedures come within title III, the amendment is desirable.

With the outbreak of war, consideration of administrative procedure was deferred until 1945. In that year, a number of bills were introduced in Congress on the subject, among others, S. 7, which, as revised, was ultimately enacted as the Administrative Procedure Act. Section 5 of S. 7 and of the statute as enacted, expressly limited the adjudicatory provision to "hearings required *by statute.*"

The phrase, "statute or constitution" was thus rejected, and the narrow term "by statute" substituted for the deliberate purpose of confining the application of Section 5 to cases in which Congress itself had specifically required a hearing. The report of the Senate Committee on the Judiciary contains an analysis of the bill by the Attorney General, who stated, without contradiction, that the reference to hearings "required by statute" results in limiting Section 5 (and, therefore, Sections 7, 8 and 11) to *"cases in which the Congress has specifically required* a certain type of hearing" (emphasis supplied; Sen. Doc. 248, 79th Cong., 2d Sess., p. 226).[48] Similarly in 1945, Mr.

[48]Not only is the Attorney General's interpretation under these circumstances "an indication of the Committee's opinion on the intended effect of the Act", *American Stevedores v. Porello,* 330 U.S. 446, 452, but representatives of the Department of Justice had worked closely with the Judiciary Committee on the legislation. (Sen. Doc. 248, 79th Cong., 2d Sess., p. 191; *id.,* pp. 248-249.)

McFarland, one of the minority members of the Attorney General's committee and chairman of the American Bar Association's special committee on administrative law, testified before the House Committee on the Judiciary as follows:

> But none of the measures, I think with one exception, provides that the procedure in respect to adjudication shall apply to any case *unless Congress has specifically by some other statute, required an administrative hearing.* (Sen. Doc. 248, 79th Cong. 2d Session, p. 79.) (Emphasis supplied.)

In brief, both the private sponsors of the bill and the Attorney General were agreed that Sections 5, 7, 8 and 11 were to apply only to cases in which Congress had specifically required a hearing.

The statements of the congressional committee are to the same effect. Thus, the comment on the Senate Judiciary Print, June, 1945, states (Sen. Doc. 248, 79th Cong. 2d. Sess. p. 21):

> * * * The introductory clause removed from the operation of sections 5, 7, and 8 all administrative procedures in which Congress has not required orders to be made upon a hearing, * * *

Again, with respect to Section 7, it is stated that "the provisions of section 7 respecting hearings are not designed to require hearings where Congress has not already done so by statute". (Sen. Doc., 248, 79th Cong. 2d Sess. p. 28.) To the same effect, see Sen. Doc. 248 supra, pp. 202, 260: 92 Cong. Rec. 2151-2152, 2155, 5649, 5651.

The distinction between a statutory requirement and one founded on the Constitution, it may be observed, is not merely a technical one. In limiting procedural requirements of the Act to cases of hearings required by statute, the Congress reserved to itself the right to choose the agencies to which the Administrative Procedure Act should apply. Under the construction advanced by the Government, the Act applies only to those agencies in which the Congress itself has determined that a formal hearing should be granted. Under the view taken by some plaintiffs in litigation, the reach of the Act depends, not on the will of Congress, but on the requirements of the Constitution as it may be construed from time to time by the Courts. The Constitution, however, provides no guide for determining whether the policy of the Administrative Procedure Act is applicable. The Act, in the main, and particularly as regards special examiners, goes far beyond constitutional requirements. Whether administrative discretion should be limited to any greater degree than the Constitution requires is clearly a matter of congressional policy. The Congress may well conclude that hearings should be granted in certain proceedings even though none is required by the Constitution. It may also conclude that in the interest of the national security or for other reasons of policy, the enforcement of other congressional enactments should not be limited beyond the strict requirements of the Constitution. As no constitutional right is involved, the choice is one for Congress to make.

In view of the foregoing, it can hardly be denied that the difference between "hearings required by statute" and "hearings required by law" was understood to be material by Congress. The deliberate change of the wording of the Statute from "hearing required by law" to "hearings required by statute" cannot have been without purpose. If Congress had not intended to limit the application of Sections 5, 7, 8, and 11 to proceedings where it otherwise provided therefor, by specific statute, it could have omitted from Section 5 the words "required by statute to be determined on the record after opportunity for an agency hearing." This would have left Section 5 applicable "to every case of adjudication." It should not be presumed that the language actually used is surplusage.

As already pointed out, the deportation statute does not in terms require a hearing. While elaborate provision for deportation hearings have been set up by administrative regulations,[49] such hearings have evolved out of well-defined concepts of due process rather than as a result of statutory mandate. In this connection the following excerpt from an article on the Administrative Procedure Act by Robert W. Ginnane, appearing in the University of Pennsylvania Law Review, May, 1947, Vol. 95, pp. 621 ff., at p. 635, states:

> "It should be noted that Sections 5, 7, and 8 apply only where a statute requires determinations (a) on the record and (b) *after opportunity*

[49]Title 8, Code of Federal Regulations, Part 150.

> *for an agency hearing.* It appears that the 'opportunity for an agency hearing' must be required by a statute—and that a due process requirement of a hearing will not bring a proceeding within Section 5." (Emphasis by the author.)

While the cases are legion which held that an alien in a deportation proceeding must be given a fair hearing most of them do not state the basis for this conclusion.[50]

However, an analysis of the cases which do mention the source of the fair hearing requirement indicates fairly clearly that the requirement is based on the due process clause of the Constitution, rather than upon the deportation statute itself. Thus, for example, in *Vajtauer v. United States*[51] the United States Supreme Court stated:

> "Deportation without a fair hearing on charges not supported by evidence constitute the *denial of due process* which may be prevented by habeas corpus." (Emphasis supplied.)

The identical terminology is used in *Bufalino v. Irvine.*[52] Similarly, it was stated in *In re Chan Foo Lin.*[53]

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[50]See, for example, *Kessler v. Strecker,* 307 U.S. 22, 34 (1939); *Kielemat v. Grossman,* 103 F. (2d) 292 (C.C.A. 5, 1939); *Harris v. Biszkowicz,* 100 F. (2d) 854 (C.C.A. 8, 1939), *Hays v. Hatges,* 94 F. (2d) 67 (C.C.A. 8, 1939); *Hays v. Zchariados,* 90 F. (2d) 3 (C.C.A. 8, 1937); *Morrell v. Baker,* 270 F. 577 (C.C.A. 2, 1920); *Whitefield v. Hanges,* 222 F. 754 (C.C.A. 8, 1915); *Ex parte Kurth,* 28 F. Supp. 259 (D.C., Cal., 1939).

[51]273 U.S. 103, 106.

[52]103 F. (2d) 830 (C.C.A. 10, 1939).

[53]243 F. 137, 142 (C.C.A. 6, 1917).

> "*The guaranty of due process* forbids the deportation of a respondent without giving him a full and fair hearing." (Emphasis supplied.)

Also, the following language in the *Japanese Immigrant Case,*[54] indicates that the hearing requirement flows from the due process clause:

> "But this Court has never held, nor must we now be understood as holding that administrative officers when executing the provisions of a statute involving the liberty of persons, may disregard the principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution."

Court decisions.

The question of the applicability of Section 5 of the Administrative Procedure Act to deportation has been considered in a number of recent cases. One of the earliest cases was that of *Eisler v. Clark,*[55] in which Judge Goldsborough held that a hearing is implicit in the deportation statute since the Courts have read due process into the statute and due process means a hearing.

In *Fajaro v. United States, et al.,*[56] Judge Coxe held on June 24, 1948, to the contrary effect. Although Judge Coxe wrote no formal opinion, his decision is clearly stated in his Findings of Fact and Conclusions of Law, particularly the following Conclusions of Law numbered 7 and 8:

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[54]189 U.S. 86, 100.

[55]77 F. Supp. 610 (D.C. Dist. Col., May 4, 1948).

[56]Southern District of New York, Civil 46-214 (not reported).

7. This Court further concludes that the hearings accorded to plaintiff by the Immigration Service were hearings not required by any statute, but hearings accorded under the due process provisions of the Constitution.

8. This Court further concludes that the provisions of the said Title 5, U.S.C. Section 1004(c) relates only to hearings "required by statute."

The matter of the applicability of the Administrative Procedure Act through deportation proceedings was considered by District Judge Clancy in *Lee Tack v. Clark,* U.S.D.C. S.D. N.Y. Civ. 46-279 (unreported) in which the Court stated on June 30, 1948:

> "The plaintiff assumes to proceed under the Administrative Procedure Act, 5 U.S.C.A. 1001, et seq. Despite the split decision in *Trinler v. Carusi,* 166 F. (2d) 157, we still do not believe that that statute applies to deportation proceedings. The reasons given in the dissenting opinion are sufficient to support our judgment."

The question of the applicability of the Administrative Procedure Act to deportation proceedings was asserted in the case of

> *Pantelis Yiakoumis, et al. v. Hall, et al.,* (U.S. D.C. Eastern Dist. of Virginia, Nos. 112, 113, 114 and 115),

in which the Court stated:

> "The serious point in the Bogiatzis case is the averment that the Administrative Procedure Act, 5 U.S.C.A. 1001 et seq. governs the conduct of deportation proceedings by the Attorney General

under the Immigration Act of 1917, as amended. 8 U.S.C.A. 155. The point was not made in the petition but was asserted for the first time at the hearing before the Court. Admittedly, the proceedings resulting in the warrant of deportation of Bogiatzis did not comply with the process of adjudication outlined by the Administrative Procedure Act.

"After a consideration of its purpose and scope, the Court is of the opinion that the Administrative Procedure Act does not control deportation proceedings by the Attorney General. This is so because the Administrative Procedure Act both expressly and impliedly excludes matters of this nature from its application.

"When the 'foreign affairs functions' of the United States are involved in any legislation (rule making) or adjudication by an administrative agency the Act is inapplicable. Sections 4, 5; 5 U.S.C.A. 1003, 1004. Undoubtedly immigration, dealing with the admission and expulsion of aliens, is an exercise of a sovereign power in international relations. *Fong Yue Ting v. U. S.* 149 U.S. 698, 713, and discussion commencing at 705. It is a power belonging to the political branches of our Government, the executive and legislative. Historically they only have occupied this field of government. The Courts have studiously refrained from incursion into that realm. Even without the express exclusions in the Act, it is doubtful that the Courts would construe the Administrative Procedure Act as empowering them to review the decisions of an executive officer in the performance of foreign affairs functions of the government.

"That the Courts have in habeas corpus passed upon deportation proceedings does not weaken this view. In every such instance the writ has gone no further than to ascertain whether a person in custody is held under authority of law, *Nishimura Ekiu v. U. S.,* 142 U.S. 651, 660, and to determine whether or not the deportation order was reached through procedures affording due process of law. *Vajtauer v. Commissioner,* 273 U.S. 103, 106. It is a review of the constitutionality of the custody and expulsion. As we shall see, the review contemplated by the Administrative Procedure Act is not so straitened.

"Under this Act the Court in its review shall 'hold unlawful and set aside' an order 'unsupported by substantial evidence'. Section 10(e), 5 U.S.C.A. 1009(e). In habeas corpus the Court in reviewing a deportation proceeding must sustain it if there is 'any' or 'some' evidence in support. *Vajtauer v. Commissioner,* supra, *Tisi v. Tod,* 264 U.S. 131; see Justice Douglas' dissenting opinion *Ludecke v. Watkins,* 335 U.S. 160, 185.

"We think that this expansion in the breadth of review argues denial of applicability of the Act to deportation proceedings, rather than an intent on the part of the Act to enlarge the review in deportation. (But see *contra U. S. v. Watkins,* 73 F. Supp. 161, 219, rev. on other grounds 164 F. (2d) 216 without mention of the instant point.) Had Congress intended so extensive a participation of the judiciary in a political matter, it would have manifested that intention by a clear and direct investiture of the Courts with such additional jurisdiction, assuming it could constitutionally have done so.

"*U. S. v. Carusi,* 3 Cir., 166 F. (2d) 457, is not necessarily in conflict with our conclusion. There the Court held that when the deportation proceeding had reached a final stage, although not the ultimate step possible under the administrative proceeding, the deportee could seek a review by petition under the Administrative Procedure Act without awaiting an arrest and resort to habeas corpus. A petition was permitted by the Court under Sec. 10(b). 5 U.S.C.A. 1009(b). It may be, although it is not our problem here, that Section 10 should be construed to authorize a review of a final determination even in those administrative proceedings in which the adjudication is not governed by the Act, sections 5, 7, and 8 (5 U.S.C.A. 1004, 1006, 1007)—that deportation, one of such proceedings, can be reviewed, on petition, within the same scope allowed habeas corpus, as a case not 'subject to the requirements of sections 7 and 8' as mentioned in section 10(e). 5 U.S.C.A. 1004, 1006, 1007, 1009(e). However, this would not sustain the position of the petitioner here. He charges that the deportation proceeding must be conducted pursuant to sections 5, 7 and 8 of the Act, and *U. S. v. Carusi* does not hold that those sections apply to deportation proceedings. We agree with *Wong Yang Sung v. Clark,* D.C. D.C., 80 F. Supp. 235, that by Sec. 7(a) also, the Administrative Procedure Act is rendered inapplicable to deportation proceedings, the provisions being that 'nothing in this chapter shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by, or designated pursuant to statute'. 5 U.S.C.A. 1006(a).

Clearly the Immigration Act requires the hearings in deportation proceedings, as well as other immigration matters, to be conducted by special officers, thus qualifying the procedure for exception under sec. 7(a) of the Administrative Procedure Act. A different conclusion, however, was reached by another judge of that Court in *Eisler v. Clark,* D.C. D.C. 77 F. Supp. 610.

"The Court will deny and dismiss all of the petitions, and this memorandum will be adopted as a statement of the findings of fact and conclusions of law in each of these cases. Counsel are requested to submit appropriate orders embodying the decisions here stated."

Any view that the due process clause of the Constitution is not self-executing, and may come into play only through legislation, so as to justify a conclusion that a hearing implicit in due process would be required by the legislation itself, hence that the deportation statute requires a hearing, seems unsound for the reason that the due process clause does not depend upon any legislation before it can come into play. The Constitution contains two due process clauses: One is the Fifth Amendment (which inhibits Federal action) and one is the Fourteenth Amendment (which inhibits State action). Both clauses are similarly worded, and neither is applicable to statutory action alone. Thus, the Fifth amendment reads, "* * * nor shall any person * * * be deprived of life, liberty or property without due process of law", and the Fourteenth Amendment reads, " * * * Nor shall any State deprive any person of life, liberty or prop-

erty without due process of law." The thing aimed at is unconstitutional *action,* State or Federal, which deprives a person of his life, liberty or property, and not merely only such action as is based on a State or Federal statute. The rights defined by the Fifth and Fourteenth Amendments are personal rights and it is these rights which the Courts protect, whether the threatened incursion be by virtue of statutory authority or authority inherent in sovereignty.

Thus, in a recent case of *Shelley v. Kraemer*[57] the United States Supreme Court held that under the Fourteenth Amendment, the State's injunctive power could not be used to enforce the restrictive covenant in question. It must be conceded that the State's injunctive power stems, not from any State statute, but from the sovereign power of the State. The constitutionally guaranteed personal rights were thus protected from impairment by State action, even though the State action was not predicated on a statute.

Similarly, Federal action in deporting an alien without a fair hearing is forbidden, not by the Federal deportation statute (which makes no provision for a hearing), but by the Constitutional guarantee of due process. Thus, deportation on a ground not specified in the statute is forbidden[58] and any attempt by a Federal Officer to deport an alien without statutory authority would be prevented by the Courts on *habeas corpus.* Such judicial action would be predicated, not

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[57]68 S. Ct. 836.

[58]*Bridges v. Wixon,* 326 U.S. 135, 149.

on the deportation statute or absence thereof, but in the due process clause of the Fifth Amendment.

(b) Deportation proceedings conducted by immigrant inspectors are within the exception to Section 7 (a) of the Administrative Procedure Act.

Assuming, without conceding, that a deportation hearing is required by the immigration statute within the meaning of Section 5 of the Act, then the applicable provisions of Sections 5, 7, 8 and 11 would govern. But Section 7(a) contains a very important exception:

> "* * * nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or in part by or before boards or other officers specially provided for by or designated pursuant to statute."

The basic immigration statute, Section 16 of the Immigration Act of 1917 (8 U.S.C. 152) provides, in part:

> * * * *That the inspection, other than the physical and mental examination, of aliens, including those seeking admission or readmission to or the privilege of passing through or residing in the United States and the examination of aliens arrested within the United States under this Act, shall be conducted by immigrant inspectors, except as hereinafter provided in regard to boards of special inquiry.* All aliens arriving at ports of the United States shall be examined by at least two immigrant inspectors at the discretion of the Attorney General and under such regulations as he may prescribe. *Immigrant Inspectors are hereby authorized and empowered to board and*

> *search for aliens any vessel, railroad car, or any other conveyance, or vehicle in which they believe aliens are being brought into the United States. Said inspectors shall have power to administer oaths and to take and consider evidence touching the right of any alien to enter, reenter, pass through, or reside in the United States, and, where such action may be necessary, to make a written record of such evidence.* * * * (39 Stat. 885-887.) (Italics added.)

This statute applies not only to exclusion cases, involving aliens seeking to enter the United States, but also expulsion cases, involving violation of the Immigration laws.[59]

And the fact that the Immigration Inspector presiding at a hearing is not completely divorced from investigative and enforcement functions does not render the hearing unfair or disqualify him from hearing the case.[60]

Immigrant inspectors are thus specifically designated by statute to conduct whatever hearings may be held in deportation matters. This authorization is confirmed and not repealed by the Administrative Procedure Act. There is nothing expressly contained in the Act which purports in terms to repeal the provisions of Section 16 of the Act of February 5,

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[59]*Loufakis v. United States*, 81 F. (2d) 966 (C.C.A. 3, 1936); *Graham v. United States*, 99 F. (2d) 746, 748-749 (C.C.A. 9).

[60]*In re Giacobbi*, 32 F. Supp. 508, affirmed 11 F. (2d) 297; *Palmer v. Ultimo*, 69 F. (2d) 1, cert. den. 293 U.S. 570; *Reynolds v. U.S. ex rel. Dean*, 68 F. (2d) 346, cert. denied 291 U.S. 679; *U.S. ex rel. Boris v. Marshall*, 4 F. Supp. 965, appeal dismissed 67 F. (2d) 1020, certiorari dismissed 290 U.S. 709.

1917. And repeal by implication may not be inferred in the absence of compelling evidence that Congress so intended.[61] There is no such evidence. On the contrary, Section 7(a) we submit, expressly preserves the authority of the immigrant inspectors to preside at deportation proceedings.

This construction of Section 7(a) accords with the general policy of the Act. The object of the Administrative Procedure Act was to regulate procedures developed by the administrative agencies in the exercise of their discretionary authority. The sponsors of the Act specifically disclaimed any intention to disturb procedures specifically prescribed by Congress itself. Senator McCarran, Chairman of the Senate Judiciary Committee in charge of the bill (S. 7) ultimately enacted as the Administrative Procedure Act, expressly so stated on the floor of the Senate in the following colloquy concerning the application of the Act to procedures of the Interstate Commerce Commission (Sen. Doc. No. 248, 79th Cong., 2d Sess. p. 307):

> Mr. Reed. I confess a lack of understanding of the bill. * * * Over the years the Congress has laid down rules of procedure instructing the Interstate Commerce Commission as to how to act in certain cases in the matter of rate making, valuations, and orders. *All that is prescribed by*

[61] *U.S. Alkali Ass'n v. United States*, 325 U.S. 196, 209; *United States v. Borden Corp.*, 308 U.S. 188, 198; *United States v. Jackson*, 302 U.S. 628, 631; *General Motors Corp. v. United States*, 286 U.S. 49, 61-62.

statute. Is there anything in this bill that would interfere with that procedure?

Mr. Carran. *There is nothing in this bill which would interfere with such procedure.*

* * * * * * *

Mr. Reed. And it would not change its (Commission's) *method and rule* of doing business *when the same method and rule is founded on statutory authority?*

Mr. Carran. *That is correct.*

Mr. Reed. I thank the Senator.

Mr. Carran. Let me say to the Senator from Kansas that that has been one of the great problems we have had to work out in the long months of study which we have devoted to the bill. *We did not wish to disrupt or change anything that was statutory;* and yet we wanted to establish something which would prescribe and define the avenue by which the individual citizen could gain access to a public agency which would touch his private life, and we wish to find for him a way through the procedure. (Emphasis supplied.)

Senator McCarran, in commenting on the intended effect of the provisions for judicial review, again emphasized that the bill was in no wise intended to repeal acts of Congress. He stated (id., p. 311):

Mr. McCarran. * * * But in answer to the first part of the Senator's question—namely, where a review is precluded by law—we do not interfere with the statute, anywhere in this bill. Substantive law, law enacted by statute by the Congress of the United States, granting a review or denying a review is not interfered with by this bill. *We are not setting ourselves up to abrogate acts of Congress.* (Emphasis supplied.)

As to any contention that if the exception to Section 7(a) of the Act is given the interpretation urged, then that the exception would apply alike to all administrative agencies, with the result that the hearing provisions of the Act would be rendered nugatory, it can be said that even if this were true, it should not deter the Courts from applying this Act as written by Congress. If the Act as drafted proves to be too broad in terminology, Congress can mend it. That this possibility was contemplated by Congress is shown in its discussion with respect to Section 7(a).

> Should the preservation in Section 7(a) of the "conduct of specified classes or proceedings in whole or in part by or before the boards or other officers specially provided for by or designated pursuant to statute" prove to be a loophole for the avoidance of the examiner system in any real sense, corrective legislation would be necessary.[62]

However, such fears appear to be groundless, since examination of legislation governing other administrative agencies indicates that there are numerous statutes which require agency hearings but which (unlike the deportation statute) do not specify the officer who is to conduct the proceeding. It is for such hearings that Section 7(a) indicates who shall be the presiding officer.

Thus, for example, 39 U.S.C. 232 provides that when a publication has been accorded second-class mail privileges, the same shall not be suspended or

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[62]Senate Document No. 248, 79th Congress, 2nd Session, p. 216; see also pp. 268, 325.

anulled until a hearing shall have been granted to the parties interested. The statute does not specify the officer who is to conduct the hearing. Similar examples may be found in the Packers and Stockyard Act, 7 U.S.C. 193; Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 919; Social Security Act, 42 U.S.C. 402; Federal Trade Commission Act, 15 U.S.C. 45; Federal Food, Drug and Cosmetic Act, 21 U.S.C. 344(b), 354(d) and (e); Interstate Commerce Act, 49 U.S.C. 13, 15; and Federal Alcohol Administration Act, 27 U.S.C. 204. There are doubtless others.

The purpose of the exception to Section 7(a), as revealed by the legislative history of the Act, is "to preserve special statutory types of hearing officers who contribute something more than examiners could contribute."[63] Immigrant Inspectors, by virtue of their experience in examining aliens, have special competence,[64] At any rate, since they have been specifically designated by the statute (8 U.S.C. 153) as the officers to conduct the examination in deportation cases, they come clearly within the exception to Section 7(a).

As to any view that the exception to Section 7(a) applies only to the "*conduct*" which appears in the exception, it should be observed that Section 7(a) is entitled "Presiding Officers", and it enumerates, in terms, the three classes of officers who shall preside

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[63]Senate Document No. 248, supra, p. 216.

[64]Cf. *West Indian Co. v. Root,* 151 F. (2d) 493, C.C.A. 3, 1945.

at statutory hearings. The exception, logically construed, specifies those instances in which other officers shall preside. This is borne out by the legislative history of Section 7(a):

> This subsection provides two mutually exclusive methods of hearings—by the agency itself (or one or more of its members) or by subordinate officers. *A third kind of hearing officer recognized in this subsection is one specially provided for or named in other statutes.*[65] (Emphasis supplied.)

Court decisions.

The precise point involved was raised and answered in *Wong Yang Sung v. Tom Clark,*[66] by Judge Holtzoff who on July 28, 1948, dismissed a writ of habeas corpus on the holding that:

> Section 152 of Title 8 of the Immigration Law, which governs the authority and power of Immigration Inspectors, provides that said Inspectors shall have power to administer oaths and to take and consider evidence touching the right of any alien to enter, reenter, pass through or reside in the United States, and where such action may be necessary, make a written record of such evidence. In the light of this provision it seems to the Court that deportation proceedings are within the exception specially specified in Section 7(a) of the Administrative Procedure Act, because it is "a specific class of proceedings before officers specially provided for by, or designated pursuant to statute."

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[65]Senate Document No. 248, supra, p. 207.

[66]80 F. Supp. 235.

> In the light of this, the Court feels that immigration deportation hearings may be properly conducted by Immigrant Inspectors and that the requirement as to hearing before specially appointed examiners as provided by the Administrative Procedure Act, does not apply.

Earlier, on July 6, 1948, Judge Rifkind also held in the exclusion case of *Obum v. Watkins*[67] that:

> * * * Relator's second specification is that the Board of Special Inquiry was not constituted in compliance with the Administrative Procedure Act, 5 U.S.C.A. Section 1010. Assuming that to be so, such boards have a dispensation accorded to them by Section 1006 of the Act, which, so far as is pertinent, reads as follows:
>
> "(a) There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided by this chapter; but nothing in this chapter shall be deemed to supersede the conduct of specified classes of proceedings in whole or in part by or before boards or other officers specially provided for by or designated pursuant to statute."
>
> Boards of special inquiry operating under the Immigration Act are "specially provided for or designated pursuant to statute" 8 U.S.C.A. 153 * * *.

And in *Lee Tack v. Clark, et al.*[68] Judge Clancy, on June 30, 1948, in denying plaintiff's motion for

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[67]82 F. Supp. 36.

[68]U.S.D.C. S.D. N.Y. Civ. 46-279 (unreported).

an injunction and granting defendant's motion to dismiss the complaint, spoke broadly of the Administrative Procedure Act, as follows:

> "The plaintiff assumes to proceed under the Administrative Procedure Act, 5 U.S.C.A. 1001, et seq. Despite the split decision in *Trinler v. Carusi,* 166 Fed. (2d) 157, we still do not believe that the statute applies to deportation proceedings. *The reasons given in the dissenting opinion are sufficient to support our judgment.*" (Italics added.)

That holding, while pertaining more specifically to Section 10 of the Administrative Procedure Act, is believed to indicate the thinking of the Court with respect to the general applicability of the Act to deportation proceedings.

In the cases of *Azzollini v. Watkins,* and *Abbatista v. Watkins,* in the United States District Court for the Southern District of New York, 81 F. Supp. 127, the Court stated:

> "Petitioners ask that proceedings instituted for their deportation, and which have resulted in orders for deportation, be reviewed by this Court under Section 10 of the Administrative Procedure Act (5 U.S.C. 1009) and that pending such review proceedings be stayed. In my opinion the Administrative Procedure Act has no application. * * *"

When the *Azzollini* cases were brought to the attention of the U. S. Court of Appeals for the 2nd Circuit, 172 F. (2d) 897 Frank, Circuit Judge, in his opinion stated:

> "Until the enactment of the Administrative Procedure Act of 1946, it was clear that habeas corpus was the only procedure by which deportation proceedings could be reviewed. *Imperiale v. Perkins,* 66 F. (2d) 805 (App. D.C.); *Kabadian v. Doak,* 65 F. (2d) 202 (App. D.C.); *Sibray v. United States,* 158 F. 401, (C.C.A.-3rd). Petitioner contends that Sec. 10 of the Administrative Procedure Act, 5 U.S.C. Sec. 1009, authorizes review by means of this petition to review, even though he is not now in custody. The Court of Appeals for the 3rd Circuit so held in *Trinler v. Carusi,* 166 F. (2d) 457. But we need not decide this question, for, even if this form of review is permissible, the petition is without merit."

The claim that the Administrative Procedure Act applied to immigration proceedings was urged in the case of *Wong So Wan* and *Wong Tuey Wan* on Habeas Corpus, No. 28214-G, 82 Fed. Supp. 60 before Judge Goodman in this District. On October 29, 1948, Judge Goodman stated:

> "It is claimed that the Administrative Procedure Act of June 11, 1946 (5 U.S.C. 1001 et seq.) applied to Immigration Procedures. I am convinced that it does not. (5 U.S.C. 1006(2)); *U. S. v. Watkins,* 73 Fed. Supp. 216; *Obum v. Watkins,* S.D. N.Y. decided June 6, 1948 not yet reported; *Wong Yang Sung v. Clark,* D.C. D.C. decided July 28, 1948, not yet reported. Certainly it does not apply to preliminary examinations. 8 U.S.C. 152; *Ngim Ah Oy v. Haff,* 9 Cir. 112 Fed. 2d 607".

The District Court for the District of Columbia (Judge Holtzoff) again considered the question in

Wong Yang Sung v. Clark, 80 F. Supp. 235. That matter involved a petition for writ of habeas corpus to review an order of deportation. One of the grounds upon which the review was sought, was that the proceeding was not held and instituted in accordance with the provisions of the Administrative Procedure Act. The Court ruled that the provision of Title 5 U.S.C.A. 1006, Sub-Sec. (a) constituted an exception in favor of deportation hearing because of the provision of 8 U.S.C.A. 152 authorizing immigrant inspectors to administer oaths and to conduct and consider evidence bearing upon the right of any alien to enter, re-enter, pass through or reside in the United States, and where such action may be necessary, make and retain a record of such evidence. The Court held that deportation proceedings are "a specific class of proceeding before officers specially provided for by or designated pursuant to statute," and that the requirements as to hearing before specially appointed examiners as provided by the Administrative Procedure Act does not apply. On Appeal to the United States Court of Appeals for the Second Circuit (District of Columbia) this same case was decided on April 4, 1949 in the following language:

> "Per curiam: The judgment of the District Court is affirmed on the opinion of Judge Holtzoff. *Wong Wan Sung v. Clark,* 80 F. Supp. 235."

It is immaterial that appellant entered the United States legally. *Azzollini, et al. v. Watkins,* (C.C.A. 2nd, decided March 10, 1949).

The District Court for the District of Columbia, Judge Pine, again considered this question in the

case of *Chow Kau v. Clark,* Civ. No. 5040-48 (not yet reported). This case involved a native citizen of China, who was arrested and granted a deportation hearing, following which a warrant of deportation was issued. The plaintiff contended that the warrant of deportation was invalid because hearings had not been held in compliance with the Administrative Procedure Act. In the Court's opinion, dated April 27, 1949, it was stated:

> "In *Sung v. Clark, et al.* (80 Fed. Supp. 235) District Judge Holtzoff referred to subsection (a) of Section 7 of this Act, providing that 'nothing in this chapter shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute," and held that 'deportation proceedings are within the exception contained in Section 7(a) of the Administrative Procedure Act.' The United States Court of Appeals for the District of Columbia affirmed on Judge Holtzoff's opinion (*Sung v. Clark, et al.,* No. 10009, April 4, 1949). This would appear to be dispositive in this jurisdiction of plaintiff's Administrative Procedure Act or the Declaratory Judgment Act.
>
> "This motion to dismiss is therefore granted. Counsel will submit appropriate order."

In the case of

> *Alfredo Dante Perfumo v. Shaughnessy,* U.S. D.C. N.Y. Civ. 49-569, Apr. 27, 1949 (not yet reported),

the Court had for consideration an action to enjoin the District Director from deporting plaintiff under

an order and warrant of deportation. The Court (J. Kaufman) declined to comment as to whether Section 10 of the Administrative Procedure Act (5 U.S. C.A. 1009) permitted judicial review of deportation proceedings through an action seeking injunctive relief since all the objections raised against plaintiff's deportation were without merit. In its opinion, the Court stated:

> "Plaintiff argues that the deportation hearings were not conducted in accordance with the provisions of the Administrative Procedure Act. There is no substance to that contention. Those sections of the Administrative Procedure Act which are claimed to have been violated do not apply, by force of the statute itself, to deportation proceedings. Administrative Procedure Act, Sec. 7(a), 5 U.S.C.A. Sec. 1006(a); *Azzollini v. Watkins,* (C.A. 2, March 10, 1949); *United States ex rel. Johnson v. Watkins,* 170 F. (2d) 1009, 1013. The claim that the immigration department has been discriminatory is unfounded since the alien entered as a stowaway and is clearly deportable under the immigration laws. 8 U.S. C.A. Sec. 136(1); *Pisano v. Tillinghast,* 1 Circ. 40 F. 2d 51; *York v. Nicolls,* 66 F. Supp. 747.
>
> "Motion to dismiss complaint is granted."

4. THAT I. F. WIXON INDIVIDUALLY AND AS DISTRICT DIRECTOR OF THE UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, DEPARTMENT OF JUSTICE, IS NOT A PROPER DEFENDANT, EITHER INDIVIDUALLY OR OFFICIALLY. IT FOLLOWS BY COROLLARY THAT ARTHUR J. PHELAN, ACTING DISTRICT DIRECTOR OF THE UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, DEPARTMENT OF JUSTICE, WOULD ALSO NOT BE A PROPER DEFENDANT INDIVIDUALLY OR OFFICIALLY.

5. THAT THE COMPLAINT IN THIS ACTION STATES NO CAUSE OF ACTION, AS TO I. F. WIXON, INDIVIDUALLY OR OFFICIALLY, AND SINCE THE NAME OF ARTHUR J. PHELAN HAS BEEN SUBSTITUTED FOR THAT OF I. F. WIXON, IT STATES NO CAUSE OF ACTION AS TO ARTHUR J. PHELAN, INDIVIDUALLY OR OFFICIALLY.

At all times mentioned in appellants' complaint, filed in the United States District Court, I. F. Wixon was District Director of District No. 13, Immigration and Naturalization Service, Department of Justice. On May 1, 1949, Arthur J. Phelan became Acting District Director of the same District, and is presently occupying said position.

While serving as District Director of the 13th Immigration District, and as such District Director, the said I. F. Wixon, pursuant to instructions from his superiors, the Commissioner of Immigration at Washington, D. C., and the Attorney General, Department of Justice, Washington, D. C., directed that hearings be held to determine whether the appellants herein are subject to deportation upon charges contained in warrants of arrest heretofore served upon each and every appellant. It is stipulated to by appellee herein that in each and every case one of the issues to be determined is whether the appellants individually are or have been members of an organization that believes

in, advises, advocates or teaches the overthrow by force or violence of the Government of the United States * * *, or are otherwise subject to deportation under other provisions of the Act of October 16, 1918, as amended (8 U.S.C. 137). It is to prevent the holding of these hearings that appellants seek injunctive relief.

As District Director of the Thirteenth District of the Immigration and Naturalization Service, the appellee acted only as an agent or employee of the Attorney General of the United States, and his duties are prescribed by regulations promulgated by the Attorney General.

8 C.F.R. 60.2 sets forth the powers and duties to be performed by the District Directors of the United States Immigration and Naturalization Service under the direction of the Attorney General of the United States, by and through the Commissioner of Immigration and Naturalization.

8 C.F.R. 60.2 reads as follows:

> "*Under the general direction of the Commissioner,* and subject to the provisions of this chapter, a District Director shall supervise and direct within his district the administration and enforcement of immigration, nationality and all other laws determined by this Service * * *." (Emphasis supplied.)

The hearings of each and every one of these appellants were set by him pursuant to the regulations of the Attorney General promulgated by and through the Commissioner of Immigration and Naturalization as follows:

8 C.F.R. 150.6 (a)

"After an alien has been taken into custody under a warrant of arrest * * * the alien shall be granted a hearing to determine whether he is subject to deportation on the charges stated in the warrant of arrest * * *.

(b) "The Immigrant Inspector assigned to conduct a hearing under a warrant of arrest shall be referred to as the 'presiding inspector'. The Immigrant Inspector who conducted the investigation in a case shall not act as presiding inspector unless the alien consents thereto. The presiding inspector shall rule upon all objections to the introduction of evidence or motions made during the course of the hearing, * * *."

The procedure for these hearings is fully set forth in Regulations 8 C.F.R. 150.6 and 150.7.

There are in the regulations no other provisions for the conduct of deportation hearings in any other manner.

In *Generich v. Rutter,* 265 U.S. 388, 68 L. Ed. 1068, 44 S. Ct. 532, plaintiff sought to compel the performance of an act by a subordinate over which officially he had no control. In its decision the Court said:

"The act and the regulations make it plain that the prohibition commissioner and the prohibition director are mere agents and subordinates of the Commissioner of Internal Revenue. They act under his direction and perform such acts only as he commits to them by the regulations. They are responsible to him and must abide by his direction. What they do is as if done by him. He is the public's real representative in the matter, and if the injunction were granted, his

> are the hands which would be tied. All this being so, he should have been made a party defendant —the principal one—and given an opportunity to defend his direction and regulations."

In this case, the direction and regulations are those of the Attorney General of the United States.

Webster v. Fall, 266 U.S. 507, 69 L. Ed. 411, 45 S. Ct. 148;

Warner Valley Stock Co. v. Smith, 165 U.S. 34; 41 L. Ed. 621, 17 S. Ct. 225.

Also unreported case of

Toshiyo v. Ozaki v. John D. Nagle, Equity No. 3418 decided January 18, 1933.

The appellee is not a proper party defendant for the reason that appellants seek to enjoin him from the performance of an official and administrative act over which he has no control or authority.

The Court below relied upon the case of *Williams v. Fanning,* 332 U.S. 490, L. Ed. 161, Dec. 8, 1947, as authority for the point that the Attorney General of the United States is not an indispensable party to this proceeding. (Tr. p. 20.) It will be noted, however, that where action is necessary on the part of a superior officer, such officer is an indispensable party if the decree granting the relief sought will require him to take action either by exercising directly a power lodged in him or by having a subordinate exercise it for him. In the instant case it would be necessary, if in fact the provisions of the Act are applicable, for the Attorney General of the United States to take action to put into effect the necessary regu-

lations to provide for the execution of the provisions of the Administrative Procedure Act (supra.). On page 492 of the opinion of the Court in the *Fanning* case (supra.) the Court stated:

> "It was long assumed that the Postmaster General was not an indispensable party in these fraud order cases. Beginning at least with *American School of Magnetic Healing v. McAnnulty,* 187 U. S. 94, decided in 1902, the maintenance of the suit against the local postmaster alone was not challenged.
>
> "Meanwhile, another line of cases was emerging. *Warner Valley Stock Co. v. Smith,* 165 U.S. 28, held that a suit against the Secretary of the Interior to compel him to issue patents to public lands abated on his resignation. As the purpose of the bill was 'to control the action of the Secretary of the Interior' (165 U.S. p. 34), he was held to be an indispensable party. Next came *Gnerich v. Rutter,* 265 U.S. 388, which was a suit to enjoin a representative of the Commissioner of Internal Revenue from enforcing a restriction embodied in a permit issued under the National Prohibition Act. The subordinate official, acting for the Commissioner, had refused to give plaintiffs the more liberal permit which they desired; and he had no power to grant the desired permit without revision of his delegated authority. The Commissioner was held to be an indispensable party. *Webster v. Fall,* 266 U.S. 507, followed. That was a suit brought by an Osage Indian to require payment to him of funds under an act of Congress. The power and responsibility of making the payments being in the Secretary of the Interior, he was held to be an indispensable party.

"These cases evolved the principle that the superior officer is an indispensable party if the decree granting the relief sought will require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him."

In view of the present regulations of the Attorney General governing hearings in deportation proceedings (8 U.S.C. 150, supra.), it is clear that a restraining order upon I. F. Wixon (now Arthur J. Phelan) would directly require him to act contrary to the regulations of the Attorney General. A decree granting the relief sought would therefore require the Attorney General to take action. The *Fanning* opinion further states:

"That principle was brought into clearer relief by *Colorado v. Toll,* 268 U.S. 228. There the director of national parks had issued regulations forbidding operation in the Rocky Mountain National Park of automobiles for hire. Toll was the superintendent of the park who was enforcing the regulation. A suit to enjoin him was allowed to be maintained without joining his superior, the director, who had promulgated the regulation. That result followed, 268 U.S. p. 230, by analogy to those cases which permit suit against a public official who invades a private right either by exceeding his authority or by carrying out a mandate of his superior. *United States v. Lee,* 106 U.S. 196; *Philadelphia Co. v. Stimson,* 223 U.S. 605, 619, 620. In those situations relief against the offending officer could be granted without risk that the judgment awarded would 'expend itself on the public treasury or

domain, or interfere with the public administration.' *Land v. Dollar,* 330 U.S. 731, 738."

If the Attorney General is required by injunction to comply with the provisions of the Administrative Procedure Act he must provide for the appointment of officers to preside at the reception of evidence (5 U.S.C. 1004(c) and 1010). This would involve an expenditure from the public treasury of the United States. The decision cited concludes as follows:

"But the distinction we have noted between these two lines of cases apparently was not as clear to others as it seems to us. For a conflict among the circuits developed in these postal fraud cases. *National Conference v. Goldman,* 85 F. 2d 66, which held that the Postmaster General must be made a party, suggested that if he were not, the local postmaster would be left under a command of his superior to do what the court has forbidden. But that seems to us immaterial if the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the court. It seems plain in the present case that that will be the result even though the local postmaster alone is sued. It is he who refuses to pay money orders, who places the stamp 'fraudulent' on the mail, who returns the mail to the senders. If he desists in those acts, the matter is at an end. That is all the relief which petitioners seek. The decree in order to be effective need not require the Postmaster General to do a single thing—he need not be required to take new action either directly as in the *Smith* and *Fall* cases or indirectly through his subordinate as in the *Rutter* case. No concurrence on his part is necessary to make lawful the

payment of the money orders and the release of the mail unstamped. Yet that is all the court is asked to command. *Reversed.*"

Judge Harris in the District Court below more recently held in *Van Raeken v. United States,* No. 28807-H, decided June 3, 1949, not yet reported, a complaint for injunction against the Immigration and Naturalization Service, that the Attorney General should have been made a party defendant.

The Courts in holding that they can act on an officer within their jurisdiction have never gone so far as to hold him responsible for acts over which he has no control. It appears clearly that in the instant action the granting of the relief requested would require the Attorney General to take affirmative action and that therefore he is the proper party defendant rather than I. F. Wixon, or Arthur J. Phelan.

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6. THAT APPELLANTS HAVE NOT EXHAUSTED THEIR LEGAL ADMINISTRATIVE REMEDIES.

Appellants seek to restrain administrative hearings to determine whether they are subject to deportation. The Courts have uniformly held that they will not interfere in an administrative proceeding until final action has been taken by the administrative authorities in the manner provided by the statutes.

In *Impiriale v. Perkins,* Secretary of Labor Department, decided June 30, 1933, in the Court of Appeals of the District of Columbia, 66 F. (2d) 205, Certiorari Denied 290 U.S. 690, the Court said:

> "Since deportation proceedings are administrative and the action of the Secretary of Labor is intended by the statutes to be final, there is no regulatory power in the Courts to control the course of such proceedings while pending in the Department. The jurisdiction of the Courts is contingent, and usually to be exercised ex post facto of an order of deportation."

While there appears to be no such specific provision in the rules of this Court, it is enlightening to note that the New York District Court rules provided as follows:

> "Rule XIV (b). Writ will not be allowed unless the petition shows in exclusion cases that the alien has appealed from an order of exclusion of a Board of Special Inquiry, and that the Secretary of Labor has affirmed the exclusion and ordered the alien deported. * * *"

In *United States ex rel. Loucas v. Commissioner of Immigration,* decided in the District Court, New York on May 5, 1931, 49 F. (2d) 473, it is stated:

> "That rule (Rule XIV supra.) embodies the normally appropriate attitude of the Federal Courts vis-a-vis the executive branch of the government * * * ordinarily it would be insupportable for the Courts thus to interfere ad interim with the enforcement of our laws by the appropriate executive department. Administrative redress should always be exhausted before recourse is had to the Courts."

In *United States ex rel. Peterson et al. v. Commissioner of Immigration* (D.C. N.Y.) decided Nov. 11, 1932, 1 F. Supp. 735, the Court said:

"Furthermore, on general principles Courts should not interfere with the executive in regard to any matter until the executive has made its final decision, and then only if that decision transcends the scope of executive power by reason of illegality implicit in its nature or in the method of its exercise." Citing *Hara v. U. S.,* D.C., 54 F. (2d) 397, 399.

See also *U. S. v. Parson,* 22 F. Supp. 149, to the same effect.

In *United States ex rel. Grau v. Uhl,* 262 Fed. 532, the Court said:

"Where, therefore, a question of fact is involved, the statutory remedies and appeals must first be exhausted before this Court will entertain an application for a writ of habeas corpus.

"As the petition shows on its face that petitioner has not taken his appeal to the Secretary of Labor, as provided by Section 17, the application is denied."

That the Courts may not interfere on *habeas corpus* until the administrative processes of hearing before the local immigration authorities and appeal to the Commissioner have been completed, and that in the interim the immigration authorities have power to detain the applicant appears to be settled by the case of *United States v. Sing Tuck,* 194 U.S. 161, wherein the Court said:

"In *Gonzales v. Williams,* 192 U.S. 1, there was no use in delaying the issue of the writ until an appeal had been taken, because in that case there was no dispute about the facts but merely a question of law. Here the issue, if there

is one, is pure matter of fact, a claim of citizenship under circumstances and in a form naturally raising a suspicion of fraud.

"Considerations similar to those which we have suggested lead us to a further conclusion. Whatever may be the ultimate rights of a person seeking to enter the country and alleging that he is a citizen, it is within the power of Congress to provide at least for a preliminary investigation by an inspector, and for a detention of the person until he has established his citizenship in some reasonable way."

In the case of *Lee Fong Fook v. I. F. Wixon,* C.C.A. 9, Circuit No. 11860 decided Oct. 25, 1948, 74 F. Supp. 68, 170 F. (2d) 245, Cert. den. 336 U.S. 914, the Circuit Court held that administrative remedies must be exhausted. In the last mentioned case, Lee Fong Fook was an honorably discharged veteran of World War Two and therefore there was a very strong sympathy element involved in the case. Lee Fong Fook was a Chinese who upon his return from a trip to China applied for entry into the United States as a United States citizen. He had obviously resided in the United States for a considerable period of time prior to his departure to China, from which trip he was then returning.

CONCLUSION.

For the reasons stated herein, the appellees are of the opinion that there is ample authority in law for the finding of the Court below and therefore urge that the decision of the Court below be affirmed.

Dated, San Francisco, California,
June 22, 1949.

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On the Brief.

(Appendix Follows.)

Appendix.

Appendix

A. PERTINENT IMMIGRATION STATUTES.

Title 8 U. S. Code, Section 152.

"* * * The inspection * * * of aliens, including those seeking admission or readmission to or the privilege of passing through or residing in the United States, and the examination of aliens arrested within the United States under this section, shall be conducted by immigrant inspectors, except as hereinafter provided in regard to boards of special inquiry. * * * Said Inspectors shall have the power to administer oaths and to take and consider evidence touching the right of any alien to enter, reenter, pass through, or reside in the United States, and, where such action may be necessary, to make a written record of such evidence. * * * Any district director of immigration and naturalization designated by the Commissioner or any inspector in charge shall also have power to require by subpoena the attendance and testimony of witnesses before said inspectors and the production of books, papers, and documents touching the right of any alien to enter, reenter, reside in, or pass through the United States. * * *" (Feb. 5, 1917, ch. 29, Sec. 16, 39 Stat. 885; renumbered Aug. 13, 1946, ch. 958, Sec. 5, 60 Stat. 1049).

(N.B. A discussion of the scope of this statute is found in *Graham v. United States,* 99 F. (2d) 746.)

Title 8, U.S. Code, Section 155(a).

"At any time within five years after entry, any alien who at the time of entry was a member of one

or more of the classes excluded by law; any alien who shall have entered or who shall be found in the United States in violation of this chapter * * * shall, upon the warrant of the Attorney General, be taken into custody and deported. * * * In every case where any person is ordered deported from the United States under the provisions of this chapter, or of any law or treaty, the decision of the Attorney General shall be final."

B. THE ADMINISTRATIVE PROCEDURE ACT.

Section 1. (This section merely designates the title of the Act as the "Administrative Procedure Act".)

Section 2. (5 U.S.C. 1001).

Section 1001. Definitions.

As used in this chapter——

(a) Agency.

"Agency" means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories or the District of Columbia. Nothing in this chapter shall be construed to repeal delegations of authority as provided by law. Except as to the requirements of section 1002 of this title, there shall be excluded from the operation of this chapter (1) agencies composed of representatives of the par-

ties or of representatives of organizations of the parties to the disputes determined by them (2) courts martial and military commissions, (3) military or naval authority exercised in the field in time of war or in occupied territory, or (4) functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, and the functions conferred by Sections 301-303, 304, 305, 306-309, 310, 311-318, 1611-1614, 1615-1646 of Appendix to Title 50, and sections 101-125 of Title 41; and sections 1738, 1739, and 1743 of Title 12, and sections 1821-1833 of Appendix to Title 50.

(b) Person and party.

"Person" includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies. "Party" includes any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding; but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes.

Sec. 2.

(c) Rule and rule making.—"Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates,

wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

(d) Order and adjudication.—"Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

(e) License and licensing.—"License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license.

(f) Sanction and relief.—"Sanction" includes the whole or part of any agency (1) prohibition, requirement, limitation, or other condition affecting the freedom of any person; (2) withholding of relief; (3) imposition of any form of penalty or fine; (4) destruction, taking, seizure, or withholding of property; (5) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees; (6) requirement, revocation, or suspension of a license; or (7) taking of other compulsory or restrictive action. "Relief" includes the whole or part of any

agency (1) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy; (2) recognition of any claim, right, immunity, privilege, exemption, or exception; or (3) taking of any other action upon the application or petition of, beneficial to, any person.

(g) Agency proceeding and action.—"Agency proceeding" means any agency process as defined in subsections (c), (d), and (e) of this section. "Agency action" includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act. (June 11, 1946, ch. 324, Sec. 2, 60 Stat. 217; Aug. 8, 1946, ch. 870, Title III, Sec. 302, 60 Stat. 918; Aug. 10, 1946, ch. 951, Title VI 601, 60 Stat. 993).

Amendments

1946 Subsection (a) amended by acts Aug. 10, 1946 and Aug. 8, 1946, both cited to text, both of which added at end of subsection, "Secs. 1738, 1739, and 1743 of Title 12, and Secs. 1821-1833 of Appendix to Title 50".

Effective Date

Section as effective three months after June 11, 1946, see Sec. 1011 of this title.

Sec. 3. (5 U.S.C. 1002).

Sec. 1002. Publication of information, rules, opinions, orders and public records.

Except to the extent that there is involved (1) any function of the United States requiring secrecy in

the public interest or (2) any matter relating solely to the internal management of an agency——

(a) Rules.—Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

(b) Opinions and orders. Every agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and all rules.

(c) Public records.—Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except informa-

tion held confidential for good cause found. (June 11, 1946, ch. 324, Sec. 3, 60 Stat. 238).

Effective Date

Section as effective three months after June 11, 1946, see Sec. 1011 of this title.

Sec. 4. (5 U.S.C. 1003).

Sec. 1003. Rule making.

Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts——

(a) Notice; publication and contents.— General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that

notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) Procedures.—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

(c) Time of publication or service of rules.—The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

(d) Rules.—Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule. (June 11, 1946, ch. 324, Sec. 4, 60 Stat. 238).

Effective Date

Section as effective three months after June 11, 1946, see Sec. 1011 of this title.

Sec. 5. (5 U.S.C. 1004).

Sec. 1004. Adjudication.

In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives——

(a) Notice of hearing and issues.—Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties of the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(b) Procedure.—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 7 and 8.

(c) Authority and functions of officers and employees.—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor

shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

(d) Declaratory orders.—The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to determine a controversy or remove uncertainty. (June 11, 1946, ch. 324, Sec. 5, 60 Stat. 239).

Effective Date

Section as effective three months after June 11, 1946, see Sec. 1011 of this title.

Sec. 7. (5 U.S.C. 1006).

Sec. 1006. Hearings; presiding officers; powers and duties; burden of proof; evidence; record as basis for decision.

In hearing which Sec. 1003 or 1004 of this title require to be conducted pursuant to this section——

(a) There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems

himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

(b) Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpoenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.

(c) Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary

evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(d) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary. (June 11, 1946, ch. 324, Sec. 7, 60 Stat. 241).

Effective Date

Section as effective six months after June 11, 1946, see Sec. 1011 of this title.

Sec. 8. (5 USC 1007)

Sec. 1007. Initial decisions; conclusiveness; review by agency; submission by parties; contents of decisions; record.

In cases in which a hearing is required to be conducted in conformity with Section 1006 of this title—

(a) In cases in which the agency has not presided at the reception of the evidence, the officer who pre-

sided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

(b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision or subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or

(2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof. (June 11, 1946, ch. 324, Sec. 8, 60 Stat. 242).

Effective Date

Section as effective three months after June 11, 1946, see Sec. 1011 of this title.

Sec. 10 (5 USC 1009)

Sec. 1009. Judicial review of agency action.

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) Right of review.— Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) Form and venue of action.— The form of proceeding for judicial review shall be any special

statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) Reviewable acts.— Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) Interim relief.— Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable

injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) Scope of review.— So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. (June 11, 1946, ch. 324, Sec. 10, 60 Stat. 243).

Effective Date

Section as effective three months after June 11, 1946, see Sec. 1011 of this title.

Section as effective August 1, 1946 with respect to judicial review of any agency action under the Atomic Energy Act of 1946. See Sec. 1914 of Title 42, The Public Health and Welfare.

Price Decontrol Board

Orders of Price Decontrol Board not subject to review or modification. See Sec. 901 a (h) (3) of Appendix to Title 50, War.

Sec. 11 (5 USC 1010)

Sec. 1010. Appointment of examiners; assignment, removal and compensation; jurisdiction of Civil Service Commission.

Subject to the civil-service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 1006 and 1007 of this title, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission (hereinafter called the Commission) after opportunity for hearing and upon the record thereof. Examiners shall receive compensation prescribed by

the Commission independently of agency recommendations or ratings and in accordance with sections 661-663, 664-669, 670-672, 673, and 674 of this title, except that the provisions of paragraphs (2) and (3) of subsection (b) of section 667 of this title, and the provisions of section 669 of this title, shall not be applicable. Agencies occasionally or temporarily insufficiently staffed may utilize examiners selected by the Commission from and with the consent of other agencies. For the purposes of this section, the Commission is authorized to make investigations, require reports by agencies, issue reports, including an annual report to the Congress, promulgate rules, appoint such advisory committees as may be deemed necessary, recommend legislation, subpoena witnesses or records, and pay witness fees as established for the United States courts. (June 11, 1946, ch. 324, Sec. 11, 60 Stat. 224).